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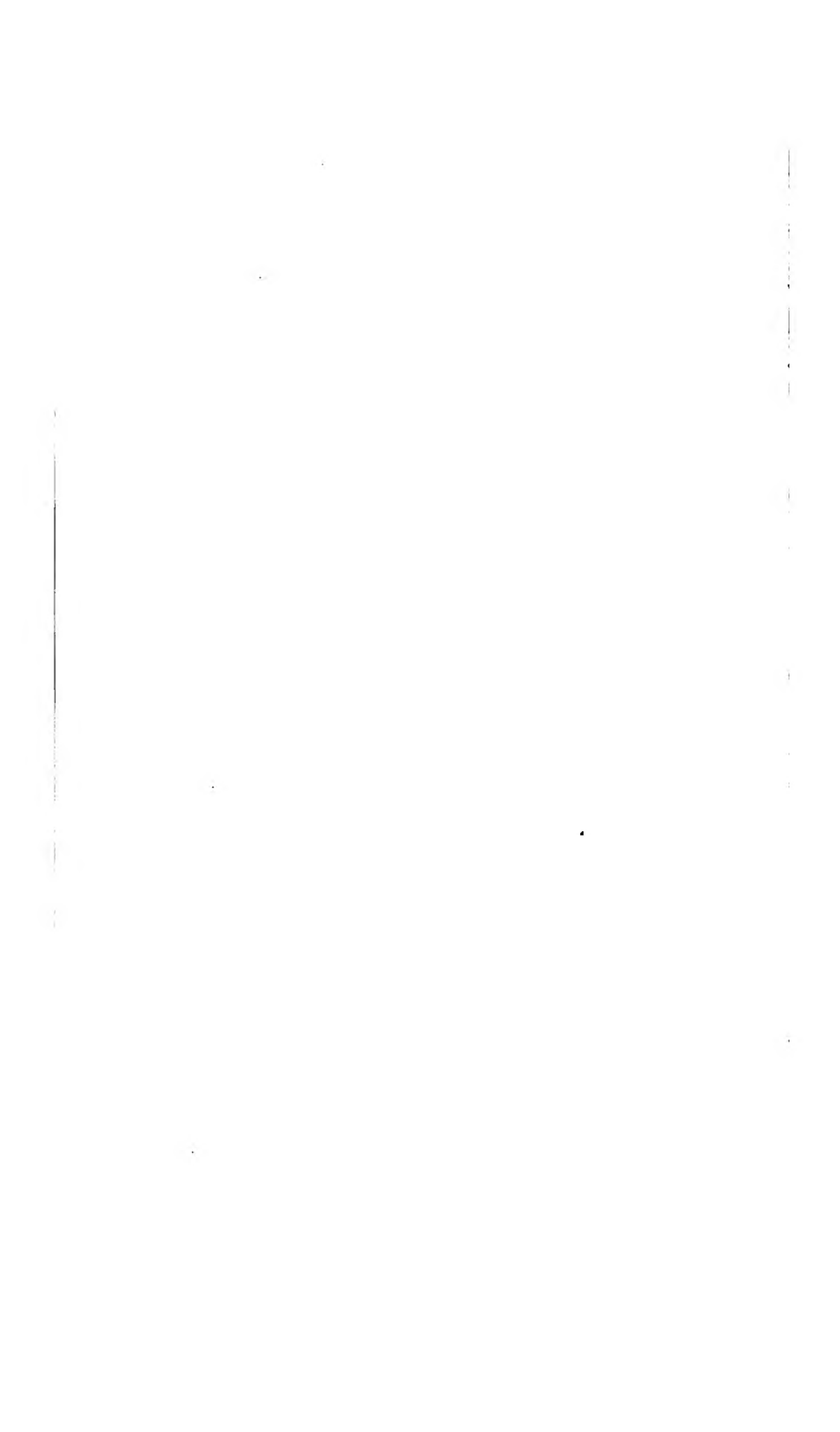
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# FEDERAL EQUITY PRACTICE

*A Treatise on the Pleadings Used and Practice Followed in Courts  
of the United States in the Exercise of their Equity Jurisdiction*

BY

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TO THE HONORABLE HENRY R. GIBSON  
of Knoxville, Tennessee, whose industry, ex-  
perience, and learning, as displayed in his  
work on *Suits in Chancery*, must long con-  
tinue to stimulate the interest and excite the  
admiration of all who may have occasion  
to refer to it for guidance or instruction.



## *Preface*

**I**N writing this treatise the author has endeavored, in the light of all the material now available for such purposes, to supply an accurate statement of the principles by which federal courts are guided in matters of equity pleading and practice and at the same time to show, by illustrations from the cases, the way in which those principles are applied in the processes of actual litigation. The cases cited are drawn almost exclusively from the decisions of the federal courts, but a few have been taken from the decisions of the English Chancery and other courts of equity following approved chancery practice.

It is to be understood that the illustrative matter, printed in subordinate type, does not consist of a mere reproduction of reporter's headnotes. It is largely the result of the author's own independent analysis, though in a few instances the statements of the cases are based on analyses contained in subsequent opinions wherein the prior decisions have been subjected to judicial scrutiny. In making analyses and in stating the effect of decisions the author has constantly kept before him a definite ideal, namely, to deal with the law and fact of the case from the standpoint of the lawyer engaged in using an authority before a court in actual practice. The author's conception of the proper way of doing this cannot be better explained than in words used by Mr. Justice Miller in an address delivered, in 1888, before the Law Department of the University of Pennsylvania, on the "Use and Value of Authorities." The sagacious and learned judge was discussing the proper use of judicial precedents in oral arguments before courts, but his observations are applicable with equal force to the use of decided cases in other connections. After remarking on the circumstance that the reporter's headnotes are very rarely found to contain a good summary of the facts and law of a case, Justice Miller said: "If a case is worth citing in an oral argument to the court, and especially to a court of final resort, it is worth while to put that court in possession of so much of the elements of it as is necessary to understand what was decided in it. The counsel whom I have known who used the authority of adjudged cases with most skill and effect will, with the book from which they intend to read lying before them, make, in their own language and not in that of the reporter, a condensed statement of the



issues in the case, and how they arose, so far as they are applicable to the point in hand. Having done this, and given the court whom he is addressing to understand, if necessary, the character of the court which decided the case he is about to cite, counsel then reads from the report of the opinion the most condensed statement he can find of the decision of the court and of the reasons on which it was based." By this means, he observed, "the court is at once put in possession of the point actually decided in the case cited, and is enabled to discern how far it is applicable to the case before it, and to gain some idea of the reasoning on which that principle was made to rest in the former case" (see 121 Pa. St. xxvii).

An examination of the illustrative cases used in this treatise will show pretty clearly, we think, that the author has endeavored to follow the plan of exposition thus recommended.

The decisions of the English Chancery have been cited in this work when needed to elucidate points unsettled or left obscure by the American cases, but no effort has been made to crowd the footnotes with English citations. The English works of Smith (2d ed.) and Daniell (1st ed.) have of course been carefully studied and freely utilized; but when it has been found desirable to incorporate passages of any length from these writers, such matter has usually been quoted and printed in subordinate type.

While this treatise was in course of preparation, the second edition of Gibson's *Suits in Chancery* appeared. This admirable work has been of much assistance, and by the kindness of Judge Gibson the present writer has been permitted to use it with the same freedom as he has used Smith or Daniell. For the generous extension of this privilege the author here expresses his sincere thanks.

During the progress of this work the author had the advantage of the unsurpassed facilities supplied in the editorial department of the Edward Thompson Company, at Northport. This made possible a much speedier accomplishment of his labor than would have been possible under almost any other conditions.

THOMAS A. STREET.

UNIVERSITY OF MISSOURI,  
COLUMBIA, MO.

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### *Legal and Equitable Jurisdiction.*

#### **§ 1. Law and Equity in Federal Courts.**

When courts were first organized under the laws of the United States provision was properly made for the exercise of equity as well as common-law powers. Indeed, no practical scheme for the administration of justice could be devised, under our system of law, without taking due account of the need for the administration of equitable remedies. Equity and law are two pillars in one edifice; and neither can justly be said to be less necessary than the other.

#### **§ 2. Law and Equity in the Circuit Courts.**

The Constitution declares that the judicial power of the United States shall extend to cases both at law and in equity;<sup>1</sup> and the original Judiciary Act, organizing the courts of the United States, or, as we shall hereafter call them, the federal courts, conferred jurisdiction on the circuit courts over suits of a civil nature both at common law and in equity.<sup>2</sup> The same extent of power was also conferred, by implication if not in express terms, on the supreme court, in the exercise of its original and appellate jurisdiction.

#### **§ 3. Equitable Jurisdiction of District Courts.**

The district courts, as at first organized, were not given general jurisdiction over suits of an equitable nature; nor have equity powers ever been conferred on them in general terms. The result is that the district courts have had little to do with equity causes.<sup>3</sup> Suits in

<sup>1</sup> Const., Art. III. sec. 2.

<sup>2</sup> "Suits of a civil nature at common law or in equity." Act of Sept. 24, 1789, ch. 20, sec. 11, 1 Stat. L. 78.

<sup>3</sup> The district courts have jurisdiction in equity to enforce liens of the United States on any real estate for any internal-revenue tax, or to subject to the

payment of any such tax any real estate owned by the delinquent, or in which he has any right, title, or interest. Act of July 20, 1868, ch. 186, 15 Stat. L. 167. The same court also has jurisdiction of all suits at law or in equity brought to redress a deprivation of civil rights. Rev. Stat. sec. 563, subd. 12.

admiralty and bankruptcy are litigated in these courts; but these proceedings are of a very special sort, and they are not usually considered as being of a strictly equitable nature, though undoubtedly they partake of that character. However, the courts of bankruptcy accept and apply equitable principles in determining the rights of parties that come before such courts in bankrupt proceedings.<sup>4</sup> For instance, equitable claims, such as arise out of a breach of trust, are provable in the bankrupt court. They are regarded either as "unliquidated claims" or as being founded "upon a contract, express or implied."<sup>5</sup>

#### § 4. Circuit Court the Principal Court of Equity.

It thus appears that nearly all suits of a purely equitable nature litigated in federal courts are conducted, or at least begun, in the circuit courts. The original jurisdiction of the district courts, sitting in equity, is seldom invoked; and the same is true of the original jurisdiction, in equity, of the supreme court. Of course, as courts of appellate jurisdiction, the supreme court and the present circuit courts of appeals exercise jurisdiction in equity causes as well as in actions at law.

#### § 5. Law and Equity Distinct, though Courts Not Separated.

It is worthy of note that those who constructed the federal judicial system, instead of establishing separate courts of law and equity, such as had always existed in England prior to that time, merely conferred the two sorts of powers on the same courts. As a consequence it was left to these courts to administer legal and equitable relief as the nature of each suit brought before them might require. Doubtless the duty of administering different kinds of relief under the two different systems of jurisprudence would of itself have been enough to cause the circuit courts to split up into two sides, or divisions, with different dockets, rules, and records, concerned respectively with legal and equitable proceedings. This separation between law and equity, natural and convenient in itself, was made inevitable by the course of legislation in regard to the forms and

<sup>4</sup> *Batchelder etc. Co. v. Whitmore* 148 Fed. 928; *In re Porterfield* (1905) (1908) 123 Fed. 355, 58 C. C. A. 517; 138 Fed. 192, 196.  
*Chase, Petitioner* (1903) 124 Fed. 753, <sup>5</sup> *James v. Gray* (1904) 1 L.R.A. (N.S.) 59 C. C. A. 629; *In re Tucker* (1906) 321, 131 Fed. 401, 402, 65 C. C. A. 384.

modes of proceeding to be followed in equity and common-law causes and in regard to the rules of decision applicable to them. A brief reference to some of the enactments bearing on the subject will make this clear.

#### § 6. Statutory Recognition of Legal and Equitable Remedies.

In the original Judiciary Act the distinction between legal and equitable proceedings was emphasized in a provision to the effect that suits in equity should not be sustained where there is a plain, adequate, and complete remedy at law.<sup>6</sup> The application and bearing of this section of that statute will be more fully considered later. Here it is sufficient to observe that it is in conformity with a principle long ago developed in the English chancery and fully recognized everywhere as a valid limitation on the exercise of equitable jurisdiction. The enactment assumes, it will be noted, that there are two different sorts of remedies, the legal and the equitable, and that they are entirely separate and distinct from each other. In the same statute it was declared that, in all equity causes, the circuit courts should cause the facts on which they base their decree to appear fully in the record.<sup>7</sup>

#### § 7. State Laws as Rules of Decision in Proceedings at Law.

In regard to trials at common law, it was enacted that the laws of the several states where the actions were brought should, when applicable, be regarded as rules of decision to be followed by the federal courts, unless such laws appeared to be repugnant to the laws of the United States.<sup>8</sup> This was a very different principle from that applicable to suits in equity, for in these, as will presently appear, the rules of decision are found, for the most part, in the general principles of equity jurisprudence, as originated in the English chancery and developed in courts of equity.

#### *Procedure at Law and in Equity.*

#### § 8. Forms and Modes of Proceeding in Equity and Law.

By a supplemental statute, enacted soon after the original Judiciary Act was passed, it was declared that the forms of mesne process and the forms and modes of proceeding in suits in equity in the circuit

<sup>6</sup> Act Sept. 24, 1789, ch. 20, sec. 16, 1 Stat. L. 32.

<sup>7</sup> Act Sept. 24, 1789, ch. 20, sec. 19.

<sup>8</sup> Act Sept. 24, 1789, ch. 20, sec. 34.

and district courts should be according to the principles, rules, and usages belonging to courts of equity.<sup>9</sup>

The forms of mesne process and the forms and modes of proceeding in actions at law litigated in the federal courts were at first in conformity with the ancient and recognized course of the common law, without regard to the practice and modes of proceeding followed by the courts of the different states in actions at law. As was said by the supreme court in an early decision, the remedies in the courts of the United States are to be at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles.<sup>10</sup> This language has been repeated and the doctrine thus stated has been reaffirmed in many subsequent decisions.<sup>11</sup>

### § 9. Practice at Law Made to Conform to State Practice.

As the Judiciary Act had declared that the laws of the several states should be rules of decision upon matters of substance in trials at common law in the federal courts, it was but natural that, sooner or later, the practice and modes of proceeding in actions at law brought in the federal courts should be made to conform to the modes of proceeding prevailing in the different states where such actions were brought. This tendency was first manifested in a statute providing that, in the federal courts sitting in states newly admitted to the Union, the forms of mesne process and the forms and modes of proceeding in actions at common law should be the same as were used in the courts of original and general jurisdiction in those states.<sup>12</sup> Finally, the principle recognized in that statute was applied to all federal courts;<sup>13</sup> and, as a consequence, the mode of proceeding

<sup>9</sup> Act of Sept. 29, 1789, ch. 21, 1 Stat. L. 93; Act of May 8, 1792, ch. 36, 1 Stat. L. 276. This provision was continued by other acts passed from time to time and finally codified in 913 R. S.

<sup>10</sup> *Robinson v. Campbell* (1818) 3 Wheat. (U. S.) 212, 222, 4 L. ed. 372, 375.

<sup>11</sup> *Lindsay v. First Nat. Bank* (1895) 156 U. S. 435, 39 L. ed. 506; *Thompson v. Railroad Companies* (1867) 6 Wall. 134, 18 L. ed. 765; *Bennett v. Butterworth* (1850) 11 How. 669, 13 L. ed. 859; *Jones v. Masters* (1857) 20 How. 8, 15 L. ed. 806; *Basey v. Gallagher* (1874) 20 Wall. 680, 22 L. ed. 453.

<sup>12</sup> Act of May 19, 1820, ch. 63, sec. 1, 4 Stat. L. 278; Act of Aug. 1, 1842, ch. 109, 5 Stat. L. 499.

<sup>13</sup> Sec. 914 R. S. is as follows: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." Act of June 1, 1872, ch. 255, 17 Stat. L. 197.

in actions at law was brought into harmony with the local law of the state.

### § 10. Completeness of Separation between Law and Equity.

The mode of proceeding in equity causes has, on the contrary, continued to be, as it was from the beginning, in conformity with the common usage of equity courts. It is thus seen that during the entire history of the federal judicial establishment, there has been complete separation between proceedings at law and in equity; and the respective law and equity sides of the federal courts have been kept entirely distinct from each other.

### § 11. Separation of Law and Equity Subject to Control of Congress.

Undoubtedly legal development might have taken a very different course. If Congress had seen fit to do so, it could certainly have broken down the distinction between legal and equitable remedies by establishing a system of procedure, similar to that now prevailing in the code states, under which legal and equitable principles are administered by the courts without reference to any distinction of remedies. There are expressions in some of the decisions of the federal courts from which one would infer that the distinction between the legal and equitable remedies is so firmly imbedded in the Constitution that Congress would be powerless to abolish the present system of procedure and establish another in which the double system of remedies would not be recognized.<sup>14</sup> But this notion is unwarranted. The language of the Constitution is merely to the effect that the judicial power of the courts of the United States shall extend to cases both at law and in equity. This means that those courts shall have the power to adjudicate rights involving both legal and equitable principles. There is nothing in the Constitution that necessitates the recognition of the distinction between legal and equitable remedies as a fundamental one in procedure. This distinction is entirely due to the legislation of Congress, supplemented and carried into effect, as that legislation has been, by the practice and usages of the courts themselves. When the United States courts were established modern innovations in procedure had not yet been undertaken. Those who made the law organizing the federal courts

<sup>14</sup> *Jones v. Mutual Fidelity Co.* In *Meade v. Beale* (1850) *Taney* 339, (1903) 123 Fed. 506; *Anglo-American* 361, it is said *arguendo*: "It is the form *Land etc. Co. v. Lombard* (1904; C. C. of remedy for which the Constitution A.) 132 Fed. 721, 731, 68 C. C. A. 89. provides."

knew of no other scheme of justice than that in which two sorts of remedies are administered separately. As a consequence, they established the procedure of the federal courts on the double basis.

### § 12. Right to Jury Trial as Affecting Modes of Procedure.

If Congress should ever undertake to remodel the procedure of the federal courts so as to impair the distinction between legal and equitable remedies, it would be necessary carefully to safeguard the constitutional right to a jury trial guaranteed by the Seventh Amendment. For instance, it would not be permissible to impair that right by any blending of a demand for equitable relief with a purely legal claim as to which the right to a jury trial exists. Separate proceedings would here be necessary.<sup>15</sup> But, as experience has shown, the right to a jury trial can be protected under the code system of procedure as well as under the ancient and received system now in vogue in the federal courts. That Congress has ample power, under the Constitution, to establish a system of procedure for the courts created by it, in which the distinction between actions at law and suits in equity would be abolished, is amply shown in the legislation pertaining to the judicial system of the territories.<sup>16</sup> Plainly, the Seventh Amendment does not attempt to regulate matters of pleading or practice. Its aim is not to preserve mere matters of form and procedure but substance of right. So long as this substance of right is preserved, the procedure by which this result is reached is wholly within the discretion of Congress.<sup>17</sup> It is needless to say that this question of the power of Congress to remodel the procedure of the federal courts is very different from the question of the desirability of such a step being taken. So far as appears at the present time, the federal system of procedure fully justifies itself in professional opinion, and there is no demand for any radical change in it.

### *Separation of Law and Equity.*

### § 13. Manifestations of Principle of Separation.

The principle of separation not only prohibits the bringing of a purely legal action on the equity side, but it also prohibits the unnecessary confusion of legal and equitable matters in suits brought

<sup>15</sup> See *Scott v. Neely* (1891) 140 U. S. 109, 35 L. ed. 358.      <sup>17</sup> *Walker v. Southern Pac. R. Co.* (1897) 165 U. S. 596, 41 L. ed. 841, 17

<sup>16</sup> See, for example, the Code of Civil Procedure of Alaska, ch. I. sec. 1, 64. U. S. Sup. Ct. Rep. 421.

on either side, and especially on the law side. This principle, it will be seen, manifests itself in two branches: (1) In an action at law, neither the plaintiff nor the defendant can avail himself of purely equitable matters; (2) in a suit in equity relief will not be granted if the plaintiff has an adequate remedy at law.

#### § 14. Equitable Matters Not Available at Law.

The first of these propositions is illustrated in numerous cases, especially in suits brought to recover land. An action of ejectment, it is well settled, cannot be maintained on a merely equitable title;<sup>18</sup> nor can an equitable title be used as a defense to an action of ejectment,<sup>19</sup> even though the state practice permits it.<sup>20</sup> An action at law is not maintainable on a contract of mutual guaranty at the instance of one not a party to the guaranty, such cause of action being of equitable cognizance.<sup>21</sup>

#### § 15. Equitable Questions Excluded in Legal Proceedings.

In an action at law, the court must therefore exclude the hearing and determination of all questions that belong appropriately and exclusively to the jurisdiction of a court of equity.<sup>22</sup> Where a case is brought on the law side, "no defense can be interposed which is not strictly a legal defense."<sup>23</sup>

1. *Jones v. McMasters* (1857) 20 How. 3, 15 L. ed. 906: The suit was brought at law to recover the possession of a tract of land. The survey and location under which plaintiff claimed had been made by the government surveyor under the direction of a land commissioner, who had been properly deputed to cause the land to be surveyed. The defendant sought to question the regularity of the survey and location and also the *bona fides* of the transaction. There was no ground for saying that the survey and location were void for want of authority. It was held that, if they were voidable for irregularity or any other cause, the ques-

<sup>18</sup> *Frost v. Spitley* (1887) 121 U. S. 344; *Davis v. Davis* (1896; C. C. A.) 552, 30 L. ed. 1010; *Carter v. Ruddy* 72 Fed. 81, 18 C. C. A. 438.

(1897) 166 U. S. 493, 41 L. ed. 1090; <sup>21</sup> *Farmers' Nat. Bank v. Hannon* *Sheirburn v. De Cordova* (1860) 24 How. (1890) 4 Fed. 612.

423, 16 L. ed. 741. <sup>22</sup> *Fenn v. Holmes* (1858) 21 How. 482,

<sup>19</sup> *Mulqueen v. Schlichter Jute etc.* 16 L. ed. 198; *Hooper v. Scheimer Co.* (1901) 108 Fed. 931; *Montejo v.* (1859) 23 How. 235, 16 L. ed. 452; *Oak-Owen* (1877) 14 Blatchf. 324; *Snyder v. Smith's Lessee v. Johnston* (1875) 92 *Pharo* (1885) 25 Fed. 398; *Kircher v. U. S.* 343, 23 L. ed. 682.

*Murray* (1893) 54 Fed. 626. <sup>23</sup> *Railroad Co. v. Paine* (1867) 119

<sup>20</sup> *Foster v. Mora* (1878) 98 U. S. U. S. 562, 30 L. ed. 513; *Wilcox & Gibbs* 425, 428, 25 L. ed. 191, 192; *Scott v. Guano Co. v. Phoenix Ins. Co.* (1894) *Armstrong* (1892) 146 U. S. 499, 36 L. 61 Fed. 199; *Phoenix Ins. Co. v. Wilcox* ed. 1059; *Bagnell v. Broderick* (1839) & *Gibbs Guano Co.* (1895) 65 Fed. 724, 13 Pet. 436, 10 L. ed. 235; *Langdon v.* 13 C. C. A. 68.

*Sherwood* (1888) 124 U. S. 74, 31 L. ed.

tion was not one for a court of law in an action to recover possession. Such matter was purely of equitable cognizance, upon a bill to reform for error or mistake. Equitable defenses are not available in actions at law in the federal courts, though they may be available under the practice of the state.<sup>24</sup>

2. *Aiklen v. Chapman* (1894) 19 Fed. 488: Action of debt on a judgment obtained in a sister state. The defendant pleaded that the judgment in question was obtained by fraud. This was held to be a purely equitable defense and not available in an action at law. "If the defendant wishes to impeach the judgment for fraud or covin in obtaining it, he must invoke the aid of the court on the equity side, whose peculiar province it is to grant relief in cases of this sort."

3. *Greenberg v. Lewis* (1900; C. C. A.) 100 Fed. 1, 40 C. C. A. 249: An action at law was properly brought and litigated in the federal court of Louisiana. The purpose was to get judgment on a contract and to sequester property under the Louisiana practice. Certain "third opponents," or interveners, filed petitions to assert and establish a privilege or lien on the property or its proceeds and to have the court settle priorities. The petitions were dismissed without prejudice because they sought equitable relief, which could not be had in the legal action. Such an intervention would have apparently been in conformity with the state practice in this case, but, as was remarked by court, "the state practice at law is followed with the understanding, always kept steadily in view, that equitable and legal remedies are not united."

#### § 16. Plea Setting Up Equitable Defense in Action at Law.

If the defense set up in an action of ejectment is purely equitable and verdict is given for the plaintiff, judgment thereon will be entered in his favor on the pleadings and regardless of any error in the verdict, for the law court has no jurisdiction to give judgment in favor of the defendant on a plea setting up matter of equitable cognizance.<sup>25</sup>

#### § 17. When Equitable Title Available at Law.

Where a title ordinarily treated as being of an equitable nature is recognized by local statute as a legal title, or where a title that would ordinarily be good at law is, under equitable circumstances, declared by local statute to be void, there the rights of the parties may be fully adjusted in an action at law in the federal courts.<sup>26</sup>

#### § 18. Practice Where Declaration Combines Legal and Equitable Matters.

A party who has brought an action in the law side and whose declaration or petition states matter sufficient to support any sort

<sup>24</sup> *Parsons v. Denis* (1881) 7 Fed. 317; *Gudger v. Western etc. R. Co.* (1884) 21 Fed. 81; *Davis v. Davis* (1896; C. C. A.) 72 Fed. 81, 18 C. C. A. 428.  
<sup>25</sup> *Mulqueen v. Schlichter etc. Co.* (1901) 168 Fed. 931.  
<sup>26</sup> *Robinson v. Campbell* (1818) 3 Wheat. 212, 4 L. ed. 372.



of a judgment at law, cannot be turned away from the legal forum merely because the petition or declaration also states matter cognizable in equity. The proper course in such case is to allow the plaintiff to amend and strike out from the declaration those matters that are of equitable cognizance, thus leaving the declaration unobjectionable as a legal pleading. Even though the whole case as first stated would have been proper matter for a suit in equity, and even though the equitable remedy would have been a better and more desirable procedure, yet if the plaintiff insists, he must be permitted to stay in the law court and get such a judgment as he may there show himself entitled to. In other words, the fact that the plaintiff may have a more adequate remedy in equity than at law supplies no ground for demurring to an action at law. A plaintiff will be dismissed from equity if he has a plain and adequate remedy at law, but the converse proposition is not true.<sup>27</sup>

#### § 19. When Legal Matters Cognizable in Equitable Proceeding.

One might suppose that the principle requiring the separation of legal and equitable matters would be extended so far as entirely to prevent the introduction of legal matters into an equitable controversy. Just as we learned, in a preceding section, that matters of equitable cognizance are not available in an action at law either to the plaintiff or to the defendant, so it might be imagined that in an equitable proceeding all matters of legal cognizance ought to be excluded. But this is not the law; and a little consideration will show that it ought not to be. Indeed, it would be impossible to administer justice on any such principle. There are many controversies in which matters of legal and equitable cognizance are so blended that any attempt to separate them would only be productive of injustice. Plainly there must be some forum where these controversies can be heard and fully determined. The legal forum is not suited to the purpose, because the procedure of the court of law is not adapted to the end of giving effect to equitable rights, and it is for that reason that equita-

<sup>27</sup> *Blalock v. Equitable Life Assur. Soc.* (1896) 75 Fed. 43, 21 C. C. A. 208, reversing (1895) 73 Fed. 655. The plaintiff's petition stated a cause of action for fraud and deceit in obtaining the surrender and suppression of a life insurance policy for an inadequate consideration. It also stated matter sufficient to justify equitable relief by the cancellation of a receipt and reinstatement of the policy. The petition asked for a judgment for the damages, as in an action at law, and also prayed for equitable relief. It was held that the case should not be dismissed from the legal forum if plaintiff desired to remain there, but that the declaration should be pruned of the equitable matter by amendment.

ble matters are wholly excluded from suits at law. But in equity it is different. So far as its procedure is concerned, the court of equity is abundantly competent to give relief on legal matters; and the only consideration that prevents the court of equity from taking full cognizance of legal matters is that which arises from the fact that the equity system supplements the law and does not displace it. From its first origin, equity has been used to correct and supplement the legal system; and its powers will not be exerted where the legal system itself affords sufficient redress. Evidently this is a rule of policy and convenience that may well be put aside when the proper administration of justice requires it. Accordingly it is well settled that equity will take cognizance of legal matters to the extent necessary to administer justice. In other words, when a controversy exists that justifies equitable intervention, the court of equity, having once assumed jurisdiction, will retain the cause and grant full relief, even though it is necessary to determine some matters of legal cognizance.<sup>28</sup>

#### § 20. Equity Administers Complete Relief.

All that is required is that the legal matters should be so connected with the main controversy that complete relief could not be had without determining the legal matters. If the legal matters are so far distinct as to be separable from the equitable matters, the former will not be considered.<sup>29</sup> In such a situation the bill is demurrable for misjoinder of distinct legal and equitable causes of action. But so long as the bill is not multifarious, any legal matters contained in it are a proper subject of adjudication in that suit. And the same principle applies to matters of defense. From this it follows that the existence of an adequate remedy at law in respect to some of the matters of a controversy is not always a valid objection to the exercise of equitable jurisdiction over those matters. Although part of the cause of action disclosed by the bill may be subject to the objection

<sup>28</sup> *Clark v. Wooster* (1886) 119 U. S. 254; *German Ins. Co. v. Downman* 322, 7 Sup. Ct. Rep. 217, 30 L. ed. 392; (1902) 115 Fed. 491, 53 C. C. A. 213; *Hopkins v. Grimshaw* (1897) 166 U. S. 358, 41 L. ed. 744; *Ober v. Gallagher* (1902) 113 Fed. 750, 51 C. C. A. 440 (1876) 93 U. S. 199, 23 L. ed. 829; *Taylor v. Insurance Co.* (1850) 9 How. 390; *Williamson v. Monroe* (1900) 101 Fed. 13 L. ed. 187; *Sunflower Oil Co. v. Wil-* 322; *Barrett v. Twin City Power Co.* (1892) 142 U. S. 313, 35 L. ed. 1025; *Peck v. Ayers & Lord Tie Co.* (1902) 118 Fed. 891. <sup>29</sup> *New York Guaranty Co. v. Mem-* (1902) 116 Fed. 273, 53 C. C. A. 551; *phis Water Co.* (1882) 107 U. S. 205; *Douglas Co. v. Tennessee Lumber etc.* 27 L. ed. 484; *Hudson v. Wood* (1903) Co. (1902) 118 Fed. 433, 55 C. C. A. 119 Fed. 764.

that the plaintiff has an adequate remedy at law, yet if the bill also properly embodies other features cognizable in equity alone, the objection of adequate remedy at law will not be entertained and equity will administer full relief. The principle in question is illustrated in the following cases, but it will be more fully examined and expounded in a subsequent chapter.<sup>20</sup>

1. *City of Centerville v. Fidelity Trust etc. Co.* (1902; C. C. A.) 118 Fed. 332, 55 C. C. A. 348: A bill was brought to foreclose a mortgage on a waterworks plant which had been acquired by a city. It was held that the court, having the proper parties before it, could enforce the obligation of the city for hydrant rents, although that obligation would have been enforceable at law, if the controversy over it had separately arisen.<sup>21</sup>

2. *Union Central Ins. Co. v. Phillips* (1900; C. C. A.) 102 Fed. 19, 41 C. C. A. 263: The plaintiff had a good cause of action in equity against an insurance company, arising out of its failure to perfect a contract to insure the plaintiff's intestate. It was held that in a suit in equity based on this cause of action, judgment could be awarded against the company for the amount of the policy. It was admitted that the plaintiff might have sued at law, but equity clearly had jurisdiction to compel the delivery of the policy, and having once acquired jurisdiction it would proceed to administer complete relief.<sup>22</sup>

3. *Southern Pac. R. Co. v. United States* (1906) 200 U. S. 341, 55 L. ed. 307: The bill sought to recover of the defendant railroad company sums of money obtained by it from *bona fide* purchasers under a forfeited land patent. As to this branch of the action there was an adequate remedy at law. The bill also sought a cancellation of patents and a decree quieting plaintiff's title. Discovery was also asked in respect of the sales to innocent purchasers. It was held that the bill disclosed matters of equitable cognizance, and though the decree actually entered did not grant any cancellation, the supreme court refused to entertain an objection, first raised in that court, that the plaintiff had an adequate remedy at law.

### *Jurisdiction of Federal Court of Equity.*

#### § 21. Nature of Federal Court of Equity.

The equity side of the federal court constitutes in effect a distinct chancery court. The character of this court must now be considered with regard to the following three features, (1) the jurisdiction of the court as a court of equity, (2) the nature of the equitable rules and doctrines enforced in it, and (3) the practice of the court. In other words, we are to speak of its jurisdiction, its jurisprudence, and its practice. These three subjects are very closely related to each other,

<sup>20</sup> See *infra*, § 38 *et seq.*

<sup>21</sup> *Taylor v. Insurance Co.* (1850) 9

<sup>22</sup> *Fidelity Trust etc. Co. v. Fowler* How. 390, 404, 13 L. ed. 187, 192. *Up-Water Co.* (1902) 113 Fed. 580. *Con-* on granting specific performance of a  
*tra*, *American Waterworks etc. Co. v.* contract to insure, the court may decree  
*Home Water Co.* (1902) 115 Fed. 171. for the amount of the policy.

for the principles to be stated in regard to them all have a common source in the jurisdiction, the jurisprudence, and the practice of the English High Court of Chancery. In speaking of jurisdiction, in this connection, we mean the power of the court to entertain a suit as one of equitable cognizance, not the statutory power of the court to entertain the suit as one cognizable in the court as a federal court.

### § 22. Equity Jurisdiction Uniform in All States.

The equity jurisdiction conferred on the federal courts by the laws of the United States is substantially the same in every part of the country. So far as these courts are concerned, one uniform system of equity prevails through all the states. The extent of this jurisdiction is measured, broadly speaking, by the jurisdiction exercised by the High Court of Chancery in England at the time of the passage of the Judiciary Act of 1789.<sup>33</sup>

### § 23. Federal Equity Jurisdiction Unaffected by State Statutes.

This equity jurisdiction is subject neither to limitation nor restraint by state legislation, and the federal courts of equity are not bound by state laws in regard to this matter.<sup>34</sup> State statutes creating new remedies in the state courts are not effective to impair or lessen the equity jurisdiction of the federal courts.<sup>35</sup> These courts exercise the same jurisdiction and powers in states like Louisiana and Pennsylvania, where no district court of equity has ever existed, as they do in other states where chancery courts, or courts of equity, have always existed. A state statute giving equitable jurisdiction to a state court of equity over a controversy that is not within the ancient and proper jurisdiction of the court of equity cannot be given effect in a federal court of equity; and similarly, a state statute giving a court of law power to entertain and determine equitable matters is of no moment in a federal court.<sup>36</sup> The federal court sitting in equity has jurisdiction to set aside

<sup>33</sup> *Pennsylvania v. Wheeling etc. Bridge Co.* (1851) 13 How. 518, 563, 14 L. ed. 249, 268; *Robinson v. Campbell* (1816) 3 Wheat. 222, 4 L. ed. 375; *McCullum v. Eager* (1844) 2 How. 61, 11 L. ed. 179; *Bein v. Heath* (1851) 12 How. 168, 13 L. ed. 939; *Gaines v. Chew* (1844) 2 How. 619, 11 L. ed. 402; *Story v. Livingston* (1839) 13 Pet. 359, 368, 10 L. ed. 200, 304; *Insurance Co. v. Tweed* (1868) 7 Wall. 44, 19 L. ed. 65; *Gaines v. Relf* (1841) 15 Pet. 9, 10 L. ed. 642; *Genesee v. Campbell* (1870) 11 Wall. 193, 20 L. ed. 110.  
<sup>34</sup> *Mississippi Mills v. Cohn* (1893) 150 U. S. 202, 14 Sup. Ct. 75, 37 L. ed. 1052; *McConihay v. Wright* (1887) 121 U. S. 205, 7 Sup. Ct. 940, 30 L. ed. 932.  
<sup>35</sup> *Frazer v. Colorado Dressing etc. Co.* (1890) 5 Fed. 163; *Cropper v. Co-burn* (1855) 2 Curtis 465; *Byrd v. Badger* (1858) McAllister 443.  
<sup>36</sup> A state statute permitting an equitable title to be set up as a defense in

a fraudulent sale of an infant's land made by his guardian under an authority conferred by a state court of probate; and this, though under the state laws the plaintiff has a legal remedy.<sup>27</sup> The existence of a remedy at law granted by a state statute does not exclude the equity jurisdiction of the federal court, if the cause is one within the jurisdiction of the latter court according to the established principles governing the practice of the court of equity.<sup>28</sup>

*Mississippi Mills v. Cohn* (1893) 150 U. S. 202, 37 L. ed. 1052: The bill was in the nature of a creditors' bill to reach and subject property of the defendant fraudulently standing in the name of a third party. It was prayed, *inter alia*, that a fraudulent judgment on the debtor's property might be declared of no effect. Under the law of Louisiana where the cause arose the plaintiff had a remedy at law. Said the supreme court: "Conceding it to be true that the full relief sought in this suit could be obtained in the state courts in an action at law, it does not follow that the federal court, sitting as a court of equity, is without jurisdiction. The inquiry rather is, whether by the principles of common law and equity, as distinguished and defined in this and the mother country at the time of the adoption of the Constitution of the United States, the relief here sought was one obtainable in a court at law, or one which only a court of equity was fully competent to give."

#### § 24. State Law Conferring Exclusive Jurisdiction on Other Court.

The circumstance that a state court has conferred exclusive jurisdiction in regard to certain subjects of litigation on some of its own particular courts does not in any wise lessen the power of the federal court to entertain a suit in equity in regard to those matters. "If the state legislatures could, by investing certain courts with exclusive jurisdiction over certain subjects, deprive the federal courts of all jurisdiction, they might seriously interfere with the right of the citizen to resort to those courts."<sup>29</sup> This, of course, could not be permitted under any conditions.

*Payne v. Hook* (1868) 7 Wall. 425, 19 L. ed. 200: This was a suit, in the circuit court of the United States for Missouri, by a citizen of Virginia, against a public administrator, to obtain a distributive share of an estate then under administration in a court of Missouri. It was objected that the plaintiff, if a citizen of Missouri, could obtain redress only through the local probate court, and that

an action of ejectment cannot be given 20 L. ed. 485; *Tegarden v. Le Marchal* effect in the federal courts. *Moore v.* (1904) 129 Fed. 487.

*Robbins* (1877) 90 U. S. 530, 24 L. ed. 27 *Arrowsmith v. Gleason* (1889) 129 848; *Foster v. Mora* (1879) 98 U. S. 86, 32 L. ed. 530.

428, 25 L. ed. 192; *Gibson v. Chouteau* 28 Green v. Turner (1899) 98 Fed. 754. (1871) 13 Wall. 102, 20 L. ed. 537; 29 *Barrow v. Hutton* (1878) 99 U. S. *Johnson v. Towseley* (1871) 13 Wall. 73, 80, 65, 25 L. ed. 407, 408.

she had no better or different rights by reason of being a citizen of Virginia. But the supreme court said: "We have repeatedly held that the jurisdiction of the courts of the United States, over controversies between citizens of different states, cannot be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. If legal remedies are sometimes modified to suit the changes in the laws of the states and the practice of their courts, it is not so with equitable."

### § 25. Jurisdiction as Affected by Comity and Policy.

But as a matter of comity and policy, the federal courts will sometimes refuse to give relief in a cause where the plaintiff's rights can be amply protected by the remedy provided in the state courts. Furthermore, the federal court is always careful not to permit its independent equitable jurisdiction to be perverted into an instrument for obtaining relief that ought properly to be obtainable on appeal in the state court.<sup>40</sup>

1. *Bedford Quarries Co. v. Thomlinson* (1909; C. C. A.) 95 Fed. 208, 36 C. C. A. 272: Bill in equity against executor to compel payment of a contract debt owing to plaintiff by the deceased. No reason was assigned why equity should take cognizance of the cause, and for aught that appeared the plaintiff had a sufficient remedy at law through an administration in the local courts. The federal court refused to entertain the bill. The general administration of the estates of deceased persons is left to the state laws.

2. *Little Rock Junction Ry. v. Burke* (1895) 66 Fed. 83, 13 C. C. A. 341: The record of a state court of equity condemning land to be sold for the nonpayment of taxes showed on its face that the decree was void for want of jurisdiction on the part of the court. It was held that the federal court of equity had no jurisdiction to entertain an original bill to annul that decree. The proper remedy was in the state court by appeal, or bill of review, or by ejectment to try title.

### § 26. State Court Cannot Interfere with Jurisdiction of Federal Court.

Where the federal court has once acquired jurisdiction of a suit and jurisdiction over the subject-matter of the litigation, it will not tolerate interference by a state court; nor will it permit a relitigation, in a state court, over issues in respect to which the federal court has exercised its jurisdiction. Any such interference will be prohibited either by an injunction or writ of assistance, or by a dependent suit as the case may require.<sup>41</sup> But the pendency in a state or

<sup>40</sup> *Barrow v. Hunton* (1878) 99 U. S. *v. Manufacturing Co.* (1906) 198 U. S. 80, 85, 25 L. ed. 407, 408. 188, 195, 25 Sup. Ct. 629, 49 L. ed. 1008.

<sup>41</sup> *Freeman v. Howe* (1880) 24 How. 1015; *Campbell v. Golden Cycle Co.* 450, 16 L. ed. 749; *Julian v. Central* (1905) 141 Fed. 610, 73 C. C. A. 260; *Trust Co.* (1904) 193 U. S. 93, 24 Sup. *Guardian Trust Co. v. Kansas ste. R. Ct.* 399, 48 L. ed. 629; *Riverdale Mills Co.* (1906) 146 Fed. 349, 76 C. C. A. 615.

other court of an action *in personam* which involves no claim to or lien upon specific property in the possession or under the dominion of a federal court of equity, and over no issue of which it has acquired exclusive jurisdiction, presents no ground for a dependant bill to stay it.<sup>42</sup>

### § 27. Equitable Rights Created by State Statutes.

The proposition that the jurisdiction of the federal courts of equity is not affected by state laws and that the equity jurisdiction of these courts is the same throughout all the states must be taken subject to some qualification, for there is a class of cases in which this principle is apparently violated. These cases hold that, while it is not permissible for a state law directly to limit, extend, or determine the jurisdiction of the federal court, nevertheless the federal court will give effect to a state statute creating, increasing, or defining individual rights. A state law, so it is said, cannot give jurisdiction to any federal court, but a state law may give a substantial right of such a character that it may be enforced in the federal tribunal whether it be a court of equity, of admiralty, or of common law. The statute in such case does not confer the jurisdiction. That exists already; and it is invoked to give effect to the right by applying the appropriate remedy. Generally, it may be said, when a state statute gives a new equity, a federal court of equity may be called on to enforce it. As commonly expressed, the rule is that an enlargement of equitable rights resulting from a state statute may be enforced in a federal court of equity.<sup>43</sup>

<sup>42</sup> *Stanton v. Embrey* (1876) 93 U. S. 13 Wall. 236, 20 L. ed. 624; *Gilchrist v. 543, 554, 23 L. ed. 983, 984*; *Hughes v. Helena etc. Co.* (1893) 53 Fed. 708; *Green* (1898) 84 Fed. 833, 835, 28 C. C. Peck v. Ayers etc. Co. (1902) 116 Fed. A. 537, 539; *Hubinger v. Central Trust Co.* (1899) 94 Fed. 788, 790, 36 C. C. A. 484, 486; *B. & O. Ry. Co. v. Wabash R. Co.* (1902) 119 Fed. 678, 680, 57 C. C. A. 322, 324; *Barber Asphalt Pav. Co. v. Morris* (1904) 132 Fed. 945, 948, 66 C. C. A. 55, 58, 67 L.R.A. 761; *Ball v. Tompkins* (1890) 41 Fed. 486, 490; *Standley v. Roberts* (1894) 59 Fed. 836, 844, 8 C. C. A. 305, 314; *Merritt v. Barge Co.* (1897) 79 Fed. 228, 233, 24 C. C. A. 530, 535; *Green v. Underwood* (1898) 86 Fed. 427, 429, 30 C. C. A. 162, 164; *Ogden City v. Weaver* (1901) 108 Fed. 564, 568, 47 C. C. A. 485, 489.

<sup>43</sup> *Holland v. Challen* (1884) 110 U. S. 15, 25 L. ed. 52; *Es p. McNeil* (1871) 380, 25 L. ed. 453, 454.

*Judicial Statement of the Doctrine.*—“Whenever a new right is granted by statute, or a new remedy for violation of an old right, or whenever such rights and remedies are dependent on state statutes or acts of Congress, the jurisdiction of such cases, as between the law side and the equity side of the federal courts, must be determined by the essential character of the case; and unless it comes within some of the recognized heads of equitable jurisdiction, it must be held to belong to the other.” *Van Norden v. Morton* (1878) 90 U. S. 378,

### § 28. Basis of This Doctrine.

In studying the cases illustrative of this principle it should be borne in mind that equity is a system of remedies. The fundamental nature of these remedies has been developed and illustrated in the English court of chancery and in other courts exercising equitable jurisdiction. The use to which these remedies have been put in a measure defines their character for all time, and thus establishes the limits of the jurisdiction of the court. But when new rights are created by statutes, the equitable remedy may be used to enforce them, if it is adapted to the purpose. A moment's reflection will show that this must necessarily be so, otherwise equitable principles and equitable remedies would appear to be as fixed and unyielding as the old legal remedies. This would be contrary to the very nature of equity. It will be noted that the recognition of the principle above stated operates indirectly to extend the scope and efficacy of the equitable remedies as enforced by the federal courts in particular localities. This in a sense undoubtedly increases the jurisdiction of the court; but the result is only incidental and indirect, and the general principle that a state law cannot directly affect the jurisdiction of the federal court is left unimpaired. Always, in considering the nature and function of the federal courts, it must be remembered that they are courts of the various states in which they sit, as well as courts of the United States. It is therefore their duty in administering justice to take account of rights created and existing under the state laws, as well as of those created and existing under the laws of the United States.<sup>44</sup>

### § 29. Illustrations of State Statutes Enlarging Equitable Rights.

It is not always easy to determine whether a given statute of a state (1) enlarges equitable rights, in which case the jurisdiction of the federal courts in equity may be indirectly increased; or (2) enlarges the jurisdiction of the state court of equity, in which case it is without application to the federal courts. Only by a comparison of decided cases can one determine the class within which a particular statute properly falls. The following statutes, among others, have been held to be within the first class, as enlarging equitable rights rather than

<sup>44</sup> The principle that federal courts of been applied in many cases. *Grether v. equity will enforce new equitable rights Wright* (1896; C. C. A.) 75 Fed. 742, conferred by state statutes was first 23 C. C. A. 498; *Greeley v. Lowe* (1894) announced in *Clark v. Smith* (1839) 13 155 U. S. 58, 39 L. ed. 69; *More v. Stein-Pet.* 195, 10 L. ed. 123, and it has since back (1888) 127 U. S. 70, 32 L. ed. 51. *Eq. Prac.* Vol. I.—2.



enlarging equity jurisdiction, viz.: a statute authorizing one having title and possession, or one claiming title, whether in or out of possession, to bring a bill in equity without previous suit at law in order to remove a cloud upon the title to real estate;<sup>45</sup> a state law allowing one interested in an estate to attack a will by a "direct proceeding;"<sup>46</sup> a statute allowing a court of equity to enjoin the collection of taxes;<sup>47</sup> a statute authorizing a simple creditor to maintain a bill in equity for the appointment of a receiver and for the sale and distribution among creditors of the property of an insolvent corporation.<sup>48</sup> Mechanics' and laborers' liens created by state statutes may be enforced in the federal courts by means of equitable proceedings; and a suit brought for this purpose is not rendered multifarious by the fact that a personal judgment is sought as well as the enforcement of the lien. The personal judgment is only a mode of judicially declaring the amount due and in no respect affects the equitable jurisdiction.<sup>49</sup> The following illustrative cases will give an idea of the further operation and effect of the principle in question.

1. *Reynolds v. Crawfordville etc. Bank* (1884) 112 U. S. 405, 28 L. ed. 733: Bill in equity to quiet title. The plaintiff was not in possession, and the deed that was alleged to constitute the cloud appeared to be wholly void. Either of these circumstances would have been sufficient, under the usual equity practice, to defeat jurisdiction, since in such cases the remedy is at law. But the suit having arisen in Indiana, it was held that a statute of that state was so far operative as to justify the federal court of equity in assuming jurisdiction. It was held to be a case where a local statute had created or enlarged a substantial right enforceable in equity.

2. *Gormley v. Clark* (1890) 134 U. S. 338, 33 L. ed. 909: The supreme court sustained a suit in equity brought in the federal court under the Burnt Records Act of Illinois by one out of possession of real estate to establish his title and

<sup>45</sup> *Clark et al. v. Smith* (1839) 13 Pet. 771, 67 C. C. A. 567; *Willitt v. Baker* 195, 10 L. ed. 123; *Holland v. Challen* (1904) 133 Fed. 937.

(1884) 110 U. S. 15, 3 Sup. Ct. 495, <sup>46</sup> *Richardson v. Green* (1894) 61 28 L. ed. 52; *More v. Steinbach* (1898) Fed. 423, 9 C. C. A. 565.

127 U. S. 70, 8 Sup. Ct. 1067, 32 L. ed. <sup>47</sup> *Cummings v. National Bank* (1897)

51; *Wehrman v. Conklin* (1894) 155 U. 101 U. S. 153, 25 L. ed. 903; *Grether v.*

S. 314, 15 Sup. Ct. 129, 39 L. ed. 167; *Wright* (1896) 75 Fed. 742, 23 C. C. A.

*Gormley v. Clark* (1890) 134 U. S. 338, 498.

10 Sup. Ct. 554, 33 L. ed. 909; *Broderick's Will* (1874) 21 Wall. 503, 520, 22

L. ed. 599, 605; *Smith v. Railroad Co.* Mutual Fidelity Co. (1903; C. C. A.)

(1878) 99 U. S. 398, 25 L. ed. 437; *Bar-* 123 Fed. 506; *Land Title Co. v. Asphalt*

*don v. Land & River Improvement Co.* Co. (1903) 127 Fed. 1, 62 C. C. A. 23.

(1895) 157 U. S. 327, 15 Sup. Ct. 650, <sup>49</sup> *Davis v. Alvord* (1876) 94 U. S.

39 L. ed. 719; *Prentice v. Duluth Co.* 546, 24 L. ed. 284; *Canal Co. v. Gordon*

(1893) 58 Fed. 437, 7 C. C. A. 293; (1867) 6 Wall. 561, 18 L. ed. 894; *Gil-*

*Mathews Slate Co. v. Mathews* (1906) christ v. Helena etc. Co. (1893) 58 Fed.

148 Fed. 490, 493; *United States Min-* 708.

*ing Co. v. Lawson* (1904) 134 Fed. 769,

to recover the possession of the property. Said the court: "An enlargement of equitable rights by statute may be administered by the circuit courts of the United States as well as by the courts of the state, and when the case is one of a remedial proceeding essentially of an equitable character, there can be no objection to the exercise of the jurisdiction."

3. *De La Vergne etc. Co. v. Montgomery Brewing Co.* (1891) 46 Fed. 829: A mechanic's lien created by a state statute was enforced by bill in equity in the federal court. In discussing whether the matter fell within the cognizance of equity, the court said: "The mere fact that it is a lien that is sought to be enforced does not indicate, perhaps, that its enforcement falls on the equity side of the court. Common-law liens and liens by attachment may be said to be strictly legal in their nature, and not the subjects of equity cognizance; but the lien here in question, though the creation of the statute of the state, is upon real estate, upon which there may exist prior or subsequent liens held by persons who are proper parties to a suit affecting the title to the property. . . . The lien in the case at bar is in its very nature such as that equity, with its flexible modes and powers, can more fully mete out justice to the parties to the suit than is possible to be done in a court of law, with its more strict and unbending rules."

3. *Lorman v. Clarke* (1841) 2 McLean 568: A state statute gave to the creditor whose execution had been returned unsatisfied in whole or in part the right to file a bill in equity and compel the discovery of property or things in action due to him and of equitable interests in property, to the end that the same might be subjected to the payment of the judgment debt. It was held that this statute created a right which the federal court of equity would enforce. It was said: "If a right exist within a state which cannot be enforced at law, and which properly belongs to a chancery jurisdiction, there can be no doubt that relief may be given by the federal court. And it is immaterial whether a similar right has come under the action of a court of chancery in this country or in England. The right may be new. It may originate under a local statute or usage, and exist nowhere else. But this constitutes no objection to its enforcement. The inquiry is, is there no adequate relief at law, and does the right come within the powers of a court of chancery?"

### § 30. Limitations of Doctrine and Criterion of Its Application.

The rule embodied in the illustrations given in this section must be taken subject to the proviso that the controversy to which the suit relates is one where the court of equity alone can give adequate and full relief.<sup>50</sup> Furthermore, if the statutory remedy in any way conflicts with any right protected by the laws of the United States, or if it conflicts with the general principles underlying the application of equitable doctrines as worked out by the federal courts, such statutory remedy will not be enforced; and the principle in question will not be so applied as to justify the federal court in entertaining a suit in any case where the plaintiff appears to have a plain, adequate, and complete remedy at law.<sup>51</sup>

<sup>50</sup> See *Frost v. Spitley* (1887) 121 U. S. 552, 557, 30 L. ed. 1010, 1012.

<sup>51</sup> *Cates v. Allen* (1893) 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. ed. 804;

1. *Whitehead v. Shattuck* (1891) 138 U. S. 147, 34 L. ed. 373: This was a suit in equity to quiet the title of the plaintiff as trustee. The Iowa statute, like the Indiana statute in *Reynolds v. Crawfordville etc. Bank, supra*, gave the right to maintain such an action, whether the plaintiff was in or out of possession, against any person claiming an interest in the property. The suit was dismissed because the circumstances were such that the plaintiff had an adequate remedy at law. Said Mr. Justice Field: "The facts set forth in the bill of the plaintiff clearly show that he has a plain, adequate, and complete remedy at law for the injuries of which he complains. He alleges that he is the owner in fee, as trustee, of certain described lands in Iowa, and his injuries consist in this: that the defendants are in the possession and enjoyment of the property, claiming title under certain documents purporting to transfer the same, which are fraudulent and void. If the owner in fee of the premises, he can establish that fact in an action at law; and if the evidences of the defendants' asserted title are fraudulent and void, that fact he can also show. There is no occasion for resort to a court of equity, either to establish his right to the land or to put him in possession thereof."

2. *Scott v. Neely* (1891) 140 U. S. 103, 35 L. ed. 359: A statute of the state of Mississippi gave to creditors the right to file a bill in equity to reach and subject property of the debtor fraudulently conveyed away, and this without having reduced their claims to judgment. The federal court sitting in that state refused to give effect to this statute on the ground that it went against the doctrine that the debtor is entitled to have a jury trial on the question of the existence of his debt.

3. *Grether v. Wright* (1896) 75 Fed. 742, 23 C. C. A. 498: Taft, Circuit Judge, after analyzing the earlier decisions in regard to the enforcement by the federal courts of equity of new rights created by statute, came to the conclusion that the best clue to the solution of the problem is to be found in the question whether the new remedy in any way impairs the right to a jury trial which is guaranteed by the Seventh Amendment. If the new equitable remedy operates to deprive one of the litigants of a jury trial, the federal court will not attempt to enforce it, but will leave the parties to their remedy at law or to the equitable remedy as administered in the state forum under the state statute.

### § 31. When Federal Court Adopts Remedy Created by State Law.

Where a state law grants a new remedy the federal court of equity sitting in that state may adopt and enforce the same remedy, if it is in harmony with the general principles underlying equity as administered in the federal court. It is supposed that this proposition is true only in those situations where the granting of the remedy under the state law results in the creation of a substantial right within the meaning of the decisions already referred to.

*Hollins v. Brierfield Coal Co.* (1893) 1 C. C. A. 676; *Harrison v. Farmers'* 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Loan & Trust Co. (1899) 94 Fed. 723, ed. 1113; *Davidson v. Oalkins* (1899) 86 C. C. A. 443; *United States v. In-* 92 Fed. 230; *Railroad v. Goodrich gate* (1891) 48 Fed. 251; *Greenwood* (1893) 57 Fed. 879; *Taylor v. Clark etc. R. Co. v. Strang* (1896) 77 Fed. (1898) 89 Fed. 7; *Atlanta R. R. Co. v. 499*; *D. A. Tompkins Co. v. Catawba Western R. R. Co.* (1892) 50 Fed. 790, *Mills* (1897) 82 Fed. 783.

*Richardson v. Green* (1894; C. C. A.) 61 Fed. 423, 9 C. C. A. 565: Bill in equity to impeach and annul a will as a forgery. By the laws of Oregon the county court has exclusive jurisdiction of the preliminary probate of a will, but after that step is taken any one interested may institute a direct proceeding to overturn the will. It was held that while courts of equity as a general rule have no power to entertain a suit to avoid a will, yet as such a remedy was given by the state law, the federal court sitting in that state would entertain such a suit after the preliminary probate of the will.<sup>51</sup>

<sup>51</sup> Application to the supreme court *ad. l.* 142. To the same effect are *Wart v.* for a writ of *certiorari* in this cause *Wart* (1902) 117 Fed. 766; *Williams v.* was denied. *Richardson v. Green* (1894) *Crabb* (1902; C. C. A.) 117 Fed. 199, 159 U. S. 204, 15 Sup. Ct. 1042, 49 L. 54 C. C. A. 213, 59 L.R.A. 423.

## CHAPTER II.

### LIMITATIONS ON JURISDICTION OF COURT OF EQUITY.

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*In General.*

**§ 33. Jurisdiction Limited to Extraordinary Jurisdiction of English Chancery.**

The jurisdiction of the federal courts of equity does not extend to and include those nonjudicial powers that were exercised by the English chancellor by virtue of the king's prerogative as *parens patrias*. It extends only to such of the judicial powers of the High Court, in the exercise of its extraordinary jurisdiction as a court of chancery, as were recognized at the time of the adoption of our Constitution and the organization of our courts.<sup>1</sup>

*Fountain v. Ravenel* (1854) 17 How. 369, 15 L. ed. 90: A bill was filed by an administrator *de bonis non cum testamento annexo* to enforce the execution of a power of appointment to charitable uses created by the testator's will. The provisions of the will were such that no trust was attached to the power of appoint-

<sup>1</sup> *Meade v. Beale* (1850) Taney, 339.

ment such as would have conferred jurisdiction on the court of chancery in the exercise of its extraordinary jurisdiction. On the contrary the appointment fell within that class of cases in which the power of the chancellor would, in England, have been exercised by him as representative of the sovereign in his capacity of *parens patriæ*. It was held that the federal court of equity had no jurisdiction. Said Chief Justice Taney: "But the power which the chancellor exercises over donations to charitable uses, so far as it differs from the power he exercises in other cases of trust does not belong to the court of chancery as a court of equity, nor is it a part of its judicial power and jurisdiction. It is a branch of the prerogative power of the king as *parens patriæ*, which he exercises by the chancellor."

### § 33. No Jurisdiction to Enforce Political Rights.

An important limitation on the jurisdiction and power of the court of equity is found in the principle that equity will not assume jurisdiction where the bill seeks to enforce a purely political right. The court of equity, it has been said, is conversant only with matters of property and the maintenance of civil rights. It has no jurisdiction in matters of a political nature; nor will it interfere with the duties of any department of government, unless under special circumstances, and when necessary to the protection of rights of property.<sup>2</sup>

*Green v. Mille* (C. C. A.; 1895) 30 L.R.A. 90, 16 C. C. A. 516, 66 Fed. 862, 865: Plaintiff filed a bill against an officer charged with the fulfillment of registration laws in South Carolina. The purpose was to have certain provisions in those laws declared invalid under the Constitution of the United States and to have an injunction against the attempted enforcement of these provisions. It was held that the court of equity had no jurisdiction to entertain such suit, there being nothing in the bill to show that the case fell within the purview of the Fourteenth or the Fifteenth Amendment. The reason given for the decision was that plaintiff's remedy, so far as he had any, was at law, since equity never entertains a suit concerning matters of a purely political nature. Said Fuller, Circuit Justice: "The jurisprudence of the United States has always recognized the distinction between common law and equity as, under the constitution, matter of substance as well as of form and procedure. And the distinction has been steadily maintained, although both jurisdictions are vested in the same courts."

### § 34. Absence of Power to Make Decree Effective.

The rule that the court of equity will not undertake to enforce political rights operates with increased force where it appears that the court would not have power to make its decree effective. As was recently said by Mr. Justice Holmes, "in determining whether a

<sup>2</sup> See *re Sawyer* (1883) 124 U. S. 200, *v. Harris* (1903) 189 U. S. 475, 47 L. 31 L. ed. 402, 6 Sup. Ct. 482; *Cates v. ed.* 909; *Thompson v. Railroad Com.* Allen (1893) 149 U. S. 451, 37 L. ed. 804. (1867) 6 Wall. 134, 18 L. ed. 765; *Mississippi Mills* 13 Sup. Ct. 883, 977; *Mississippi v. Johnson* (1866) 4 Wall. 475, *v. Cohn* (1893) 150 U. S. 202, 205, 37 L. ed. 437; *Georgia v. Stanton* (1867) L. ed. 1052, 1053, 14 Sup. Ct. 75; *Giles* 6 Wall. 50, 18 L. ed. 721; *Luther v.*

court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make." 3

**§ 35. Equity Will Not Control Co-ordinate Branch of Government.**

A kindred rule is this, equity has no jurisdiction to entertain a suit and give relief, when the effect of the decree would be for the court to exert control over a co-ordinate political and administrative department of the government. The remedy in such case, if any, is at law, after the administrative action of the government is concluded. This rule apparently derives additional force, as regards the federal courts, from considerations based on the structure of our judicial system and the relations between the different branches of the government. It has been held that the federal courts are devoid of jurisdiction to entertain a suit to determine the respective rights of the parties to any land, the title of which remains in the government of the United States and in regard to which a contest between the parties is pending in the land department.

*Kirwan v. Murphy* (1903) 189 U. S. 35, 47 L. ed. 698: The original government survey of the land around a lake omitted any survey of marginal land for a considerable distance from the water. A purchaser of the surveyed land claimed to the water, thus including the margin of unsurveyed land. Subsequently, the land department undertook to survey the pretermitted land lying along the margin. Thereupon the purchaser of the surveyed portion sought a bill of injunction against the making of the new survey, as the effect of such survey would be to deprive him of the marginal land in question. It was held that the bill could not be maintained. Said the court: "The courts can neither correct nor make surveys. The power to do so is reposed in the political department of the government, and the land department, charged with the duty of surveying the public domain, must primarily determine what are public lands subject to survey and disposal under the public land laws. Possessed of the power, in general, its exercise of jurisdiction cannot be questioned by the courts before it has taken final action." 4

**§ 36. Jurisdiction Not Exercised against Conscience—Penalties and Forfeitures.**

There is a class of cases in which the court of equity, though having jurisdiction, yet refuses to exercise it, for the reason that the case of

*Borden* (1849) 7 How. 1, 12 L. ed. 531; (1901) 61 L.R.A. 230, 50 C. C. A. 79.  
*Féni v. Holme* (1868) 21 How. 481, 484, 112 Fed. 4; *Johnson v. Towseley* (1871) 16 L. ed. 198, 199; *Holmes v. Oldham* 13 Wall. 72, 20 L. ed. 485; *Shepley v.* (1877) 1 Hughes, 76, Fed. Cas. No. 6,843.  
 3 *Giles v. Harris* (1903) 189 U. S. 437, 47 L. ed. 512. See *Cosmos Exploration Co. v. Gray Eagle Oil Co.* (1903) 190 U. S. 391, 47 L. ed. 1064, affirming  
 4 *Accord, Carrick v. Lamar* (1890)



the plaintiff does not appeal to conscience. Here the court leaves the party to his remedy at law. The principle is frequently applied where a plaintiff seeks to visit on his opponent the consequences of a penalty or forfeiture. The rule is well settled that equity will not entertain such a bill.<sup>5</sup>

*Pikes Peak Power Co. v. Colorado Springs* (1900; C. C. A.) 44 C. C. A. 333, 105 Fed. 1: The grantor in a contract sought a forfeiture of the rights and privileges incident to the contract because of a failure of the grantees to complete their performance of it in time. But it appeared that the grantor was guilty of the first breach in that it had failed to pay installments due under the contract while the work was in progress. It had also endeavored to revoke and annul the grant. The grantees on the other hand had prosecuted the work with diligence and had substantially completed the contract within the stipulated time. It was held that a court of equity would not declare and enforce the forfeiture.

### § 37. Contract Infected with Illegality, Usury, or Fraud.

The same principle precludes recovery by one who seeks to enforce a contract tainted with illegality,<sup>6</sup> gross usury,<sup>7</sup> fraud, or injustice. A plaintiff will not be permitted to prevail in equity unless he comes with clean hands.<sup>8</sup> "A suit in equity is an appeal for relief to the moral sense of the chancellor. A court of equity is the forum of conscience. Nothing but good faith, the obligations of duty, and reasonable diligence will move it to action. Its decree is the exercise of discretion,—not of an arbitrary and fickle will, but of a wise judicial discretion,—controlled and guided by the established rules and principles of equity jurisprudence."<sup>9</sup>

#### *Existence of Adequate Remedy at Law.*

### § 38. Legal Remedy Excludes Jurisdiction of Equity.

The most important of all limitations on the jurisdiction of the federal court as a court of equity is found in the rule that no suit

116 U. S. 423, 29 L. ed. 677; *Brown v.* 22 C. C. A. 171, 76 Fed. 271, 293; *United Hitchcock* (1899) 173 U. S. 473, 43 L. States *v. Northern Pac. R. Co.* (1899) ed. 772; *Litchfield v. Register* (1869) 37 C. C. A. 290, 95 Fed. 884, 890 (1900) 9 Wall. 575, 19 L. ed. 681. *Compare* 177 U. S. 435, 44 L. ed. 836.  
*Gaines v. Thompson* (1868) 7 Wall. 347, 19 L. ed. 62; *Secretary v. McGarrahan* (1869) 9 Wall. 296, 19 L. ed. 579; *Noble v. Union, etc. Co.* (1893) 147 U. S. 165, 37 L. ed. 123.  
<sup>6</sup> *Medicine Co. v. Wood* (1883) 108 U. S. 218, 27 L. ed. 706; *Marble Co. v. Ripley* (1870) 10 Wall. 339, 19 L. ed. 865; *Illinois Trust etc. Co. v. Arkansas City* (1896; C. C. A.) 34 L.R.A. 518, C. C. A. 324, 111 Fed. 234, 237.  
<sup>7</sup> *Board of Trade of Chicago v. O'Dell Commission Co.* (1902) 115 Fed. 574.  
<sup>8</sup> *Interstate etc. Assn. v. Badgley* (1902) 115 Fed. 390.  
<sup>9</sup> *Trice v. Comstock* (1902) 115 Fed. 765; *Hanley v. Sweeney* (1901) 109 Fed. 712, 48 C. C. A. 812.  
<sup>10</sup> *Sanborn, Circuit Judge, in Michigan Pipe Co. v. Fremont etc. Co.* (1901) 49

in equity can be entertained where the plaintiff has an adequate remedy at law. This principle has already been referred to in connection with the discussion of the separation of the federal courts into courts of law and equity; but it must now be somewhat more fully examined. An exhaustive discussion of the subject is not practicable, for it would require one to canvass the field of equity jurisdiction in all its branches and ramifications. All that will be attempted here is to give the practitioner a general idea of the principles by which the courts are guided and to familiarize him with the attitude and tendency of the federal courts in dealing with this matter.

### § 39. Statutory Recognition of This Principle.

The principle that no suit in equity can be maintained where the plaintiff has an adequate remedy at law is recognized by all courts exercising equity powers in conformity with the practice of the English chancery. Nevertheless the rule applies with peculiar force to the federal courts. To the founders of the federal system the principle in question seemed so important that expression was given to it in the original judiciary act, and this provision of that act has remained in full force to our own day.<sup>10</sup> The mere putting of this rule into a mandatory statute has apparently had the effect of making the federal courts much more careful to preserve the rule in its full integrity than they otherwise doubtless would have been; and as a consequence, these courts have, in course of time, built up a doctrine decidedly less favorable to the exercise of equitable jurisdiction than one would expect. The temper of the courts on this question has been determined largely by the guaranty of the right to jury trial contained in the Constitution. To assert the equity jurisdiction in doubtful cases would have the result, so it is said, to deprive one of the litigants of his constitutional right, whereas it was the intention of Congress to preserve that right unimpaired.<sup>11</sup> If a plain and adequate remedy exists at law, a defendant cannot be called on to submit his rights to the decision of the court of equity, because he has a constitutional right to a trial by jury.<sup>12</sup>

<sup>10</sup> Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law. Rev. Stat. sec. 723, 1 Stat. L. 82.

C. A.; 1896) 32 C. C. A. 368, 89 Fed. 832.

<sup>11</sup> *Hipp v. Babin* (1856) 19 How. 271, 15 L. ed. 633; *Phoenix Mut. L. Ins. Co. v. Bailey* (1871) 13 Wall. 621, 20 L. ed. 503; *Lewis v. Cocks* (1874) 23 Wall.

<sup>12</sup> *Smith v. American Nat. Bank* (C. 466, 23 L. ed. 70; *Killian v. Ebbinghaus*

#### § 40. When Remedy at Law Adequate.

Before a remedy at law can be said to be adequate, in such sense as to exclude the jurisdiction of the court of equity, it must appear that the remedy afforded by the court of law is as certain, as complete, as prompt, and as efficient, to attain the ends of justice, as the remedy in equity.<sup>12</sup> The remedy at law must be adequate, and its adequacy must be so apparent as to leave no reasonable doubt that the proper remedy is at law and not elsewhere. The question is not whether there is some sort of a remedy at law, but whether it is plain, adequate, and complete. Equity jurisdiction may be invoked though there is a remedy at law, unless the remedy at law, both in respect of the final relief and the mode of obtaining it, is as efficient as the remedy in equity.<sup>14</sup>

#### § 41. How Doubts as to Adequacy of Legal Remedy Resolved.

Any doubt as to the efficacy of the remedy at law should be resolved in favor of the jurisdiction of the court of equity,<sup>15</sup> though the court undoubtedly has, in doubtful cases, a certain amount of discretion whether to retain jurisdiction in equity over the cause or not.<sup>16</sup> "Where equity can give relief the plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."<sup>17</sup>

#### § 42. Circumstances of Particular Case.

The question whether the action is one over which equity has cognizance or whether it is a legal claim that must be prosecuted on

(1884) 110 U. S. 568, 28 L. ed. 246; *Hams v. Neely* (1904) 134 Fed. 1, 10, 67  
*Fussell v. Gregg* (1885) 113 U. S. 550, C. C. A. 171, 180, 69 L.R.A. 232; *Brown*  
 28 L. ed. 993; *Sill v. Solberg* (1881) 6 v. Arnold (1904) 131 Fed. 723, 727, 67  
 Fed. 469; *Gray v. Beck* (1881) 6 Fed. C. C. A. 125, 128; *Wiemer v. Louisville*  
 595; *Whitehead v. Entwistle* (1886) Water Co. (1903) 130 Fed. 246, 250;  
 27 Fed. 779; *Yeatman v. Bradford* Springfield Milling Co. v. Barnard &  
 (1891) 44 Fed. 536; *Northern Pac. R. Leas Mfg. Co.* (1897) 81 Fed. 261, 26  
 Co. v. Amacker (C. C. A.; 1892) 1 C. C. A. 369; *Castle Creek Water Co.*  
 C. A. 345, 49 Fed. 529, affirming (1891) v. City of Aspen (C. C. A.; 1906) 76  
 46 Fed. 233; *In re Foley* (1896) 76 Fed. C. C. A. 518, 146 Fed. 8, 9.  
 899.

<sup>12</sup> *Boyce v. Grundy* (1830) 3 Pet. 210, U. S. 505, 32 L. ed. 1005.  
 7 L. ed. 655; *Insurance Co. v. Bailey* <sup>15</sup> *Monmouth Inv. Co. v. Means* (C.  
 (1871) 13 Wall. 616, 20 L. ed. 501; C. A.; 1906) 80 C. C. A. 527, 151 Fed.  
*Tyler v. Savage* (1892) 143 U. S. 79, 95, 159, 166.  
 12 Sup. Ct. 340, 36 L. ed. 82, 88; *Gorm-<sup>16</sup> Watson v. Sunderland* (1866) 5  
 ley v. Clark (1890) 134 U. S. 339, 10 Wall. 74, 18 L. ed. 580; *Boyce v. Grundy*  
 Sup. Ct. 554, 33 L. ed. 910; *Boyce's* (1830) 3 Pet. 210, 7 L. ed. 655;  
*Exrs v. Grundy* (1830) 3 Pet. 210, 215, *Sullivan v. Railroad Co.* (1876) 94 U.  
 7 L. ed. 655, 657; *Barrett v. Twin City S. 806, 24 L. ed. 324; Mutual Life Ins.*  
*Power Co.* (1902) 118 Fed. 861, 865; Co. v. Pearson (1902) 114 Fed. 395.  
*Farwell v. Colonial Trust Co.* (1908) <sup>17</sup> *Davis v. Wakelee* (1885) 185 U. S.  
 78 C. C. A. 22, 147 Fed. 490, 492; *Wil-* 688, 15 Sup. Ct. 555, 39 L. ed. 584.

the law side is one that must be determined upon consideration of the facts set forth and the relief sought. The use of the formulas ordinarily adopted in charging equitable matters is not conclusive.

*United States v. Bitter Root Co.* (1906) 200 U. S. 451, 50 L. ed. 550: The bill was filed to recover the value of timber alleged to have been wrongfully cut and taken by the defendants and converted to their own use from public lands belonging to the United States in the state of Montana. The suit was dismissed because it was held to be purely of legal cognizance. Said Mr. Justice Peckham: "Although there is a liberal use in the bill in this case of averments in regard to fraud, conspiracy, and violation of trust, of which the pleader avers the defendants have been guilty, in various ways, yet upon a careful examination of the pleading itself, and the actual facts therein stated, we concur in the view of the courts below, that the action is really nothing but an action of trespass or trover to recover damages sustained by the complainant by reason of the wrongful cutting, carrying away, and conversion of the property of the complainant, consisting of the timber on the land mentioned in the bill; and for the wrong thus done we think it clear that the complainant has a plain, adequate and complete remedy at law, and consequently the court has no jurisdiction of this bill in equity. . . . The principal ground upon which it is claimed that the remedy at law is inadequate is really nothing more than a difficulty in proving the case against the defendants."

#### § 43. Jurisdiction Determined at Time Suit Instituted.

The question whether a suit is one of equitable or legal cognizance is to be determined on the state of facts existing at the time of the institution of the suit. If a proper case for equitable intervention exists at that time, the equity court does not lose jurisdiction by reason of the fact that before the hearing something occurs that would, in the first instance, have defeated the suit as a suit in equity.<sup>18</sup>

#### § 44. Mere Prayer for Equitable Relief Does Not Give Jurisdiction.

A legal cause of action is not made cognizable in equity merely because the bill prays for equitable relief. The cause must be such as to justify the prayer. If equitable relief is prayed that is not essential to the granting of relief on the legal cause of action, or that is disconnected with it, equity will not retain jurisdiction over the legal matter.<sup>19</sup>

<sup>18</sup> *Busch v. Jones* (1902) 184 U. S. C. A.; 1901) 48 C. C. A. 466, 107 Fed. 598, 46 L. ed. 707, reversing (1900) 18 555, (1901) 48 C. C. A. 608, 109 Fed. App. D. C. 23.

<sup>19</sup> *City of Eau Claire v. Payson* (C.

### § 45. Effect of Creation of New Legal Remedy.

The adequate remedy at law such as will prevent the exercise of the jurisdiction of the federal court of equity must be an adequate remedy in existence at the time the Judiciary Act of 1789 was passed. A statutory legal remedy created by a statute subsequent to that date will not oust the federal court of its equity jurisdiction over a cause.<sup>20</sup>

### § 46. Legal Remedy in State Court.

A remedy available only in a state court is not an adequate remedy where the plaintiff, by reason of his citizenship, has a right to have the matter in controversy determined in a federal court.<sup>21</sup> This rule is particularly applicable in those states where, by reason of the absence of courts of equity, all rights are enforced in legal proceedings. The federal courts are bound to administer equitable remedies in cases to which they are applicable, regardless of the state practice and state statutes.<sup>22</sup> It is an absence of an adequate remedy at law in the federal courts, and that alone, which conditions jurisdiction in equity in those courts. The fact that the party has a remedy at law in the state courts is not material.<sup>23</sup>

### § 47. Introduction of New Remedy at Law under State Laws.

It follows that the equity jurisdiction of the federal courts is not taken away or reduced by the creation of new remedies at law by state statutes.<sup>24</sup>

1. *McConihay v. Wright* (1887) 121 U. S. 201, 30 L. ed. 932: The maintenance of a bill to quiet title was objected to on the ground that by the statutes of the state an action of ejectment could be brought against any one claiming title to or an interest in land, though not in possession. But it was said: "Bills *quis timet*, such as the present, belong to the ancient jurisdiction in equity, and no change in state legislation giving, in like cases, a remedy by action at law, can,

<sup>20</sup> *McConihay v. Wright* (1887) 121 836; *Arrowsmith v. Gleason* (1889) 129 U. S. 206, 30 L. ed. 933; *Smyth v. Ames* U. S. 86, 98, 9 Sup. Ct. 237, 32 L. ed. 630; (1898) 169 U. S. 466, 42 L. ed. 819; *Mayer v. Foulkrod* (1823) 4 Wash. C. Peck v. Ayers & Lord Tie Co. (1902) C. 349, Fed. Cas. No. 9,341; *Bean v. 53 C. C. A. 551, 116 Fed. 273; Barrett Smith* (1821) 2 Mason, 252, Fed. Cas. v. *Twin City Power Co.* (1902) 118 Fed. No. 1,174; *Coler v. Board* (1898) 89 865. Fed. 257; *U. S. Life Ins. Co. v. Cable*

<sup>21</sup> *Insurance Co. v. Cable* (C. C. A.; (1900) 39 C. C. A. 264, 98 Fed. 761; 1900) 39 C. C. A. 264, 98 Fed. 761. *National Surety Co. v. State Bank*

<sup>22</sup> *Ridings v. Johnson* (1898) 128 U. (1903) 61 L.R.A. 394, 56 C. C. A. 657, S. 212, 32 L. ed. 401. 120 Fed. 593.

<sup>23</sup> *Smyth v. Ames* (1898) 169 U. S. <sup>24</sup> *Schmidt v. West* (1900) 104 Fed. 466, 516, 18 Sup. Ct. 418, 42 L. ed. 819, 272.

of itself, curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by act of Congress."

2. *Pokegama etc. Lumber Co. v. Klamath etc. Co.* (1899) 96 Fed. 34: Action to restrain defendant from interfering with the plaintiff in the occupation and management of its lumbering business. It was objected that for the wrongs set forth in the bill, the plaintiff had its action of unlawful detainer under the state statutes. This was held not to be sufficient to oust the equity court of jurisdiction. Said Morrow, Circuit Judge: "The civil action of forcible entry and detainer has been provided by the law of this state, but not by the laws of the United States. The remedy at law that will oust this court of its equitable jurisdiction is not what may be found in the state laws, but what was provided in the common law as it existed in this country when the Judiciary Act of 1789 was enacted, or in some act of Congress providing such a remedy.<sup>15</sup> The civil action of forcible entry and detainer did not prevail at common law, and has not been provided by Congress."

#### § 48. Effect of State Statute Creating New Substantive Right.

However, though a state statute giving a new remedy cannot operate to strip the federal court of jurisdiction, the existence of the state statute will be taken into account by the federal court of equity in adjudicating the rights of the parties; and if the remedy given by the state statute appears to create new substantive rights in either of the parties, those rights will be respected and enforced by the court of equity.

1. *Cowley v. Northern Pac. R. Co.* (1895) 159 U. S. 569, 40 L. ed. 263: Suit in a federal court of the state of Washington to vacate a judgment procured in a state court by fraud. The local statutes authorized a special proceeding appropriate to such a case. It was held that the federal equity court had jurisdiction to give relief and that, in so doing, it might enforce the right conferred by the state statute as a new equitable right. The power of the court in such a case is gauged not merely by its general equity jurisdiction but also by the special authority given by the local statute.

2. *National Surety Co. v. State Bank* (1903) 61 L.R.A. 394, 56 C. C. A. 657, 120 Fed. 593, 603: A statute of Nebraska authorizes an original proceeding to annul judgments and decrees against a party who has a good defense but who is prevented from making that defense by "unavoidable casualty or misfortune." It was held that the right created by this law is such a new right as may be enforced in a federal court of equity.<sup>16</sup>

<sup>15</sup> *Robinson v. Campbell* (1818) 3 Wheat. 212, 4 L. ed. 372; *Boyle v. Zacharie* (1832) 6 Pet. 658, 8 L. ed. 536; 16 Wall. 203, 21 L. ed. 447; *Darragh v. Cropper v. Coburn* (1855) 2 Curt. C. H. *Wetter Mfg. Co.* (1897) 23 C. C. A. C. 465, Fed. Cas. No. 3,416; *Railway Co. v. Elliott* (1893) 56 Fed. 772.

<sup>16</sup> *Gormley v. Clark* (1890) 134 U. S.

### § 49. Loss of Remedy at Law.

Where the plaintiff at one time had a good remedy at law but has lost it, the fact that such legal remedy is gone supplies no ground of equitable jurisdiction.

*United States v. Ames* (1878) 99 U. S. 35, 25 L. ed. 236, affirming (1878) Fed. Cas. No. 14,440: Under proceedings at law judgment had been obtained against a certain individual, but no satisfaction was obtained. Later the plaintiff discovered that one A had been a dormant partner with the original defendant, and he accordingly filed a bill to hold A liable. It was held that the bill could not be maintained. In the circuit court the law of the case was stated thus: "A judgment recovered against one of two partners is a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment."<sup>27</sup> The remedy at law having been lost, the question is then presented whether such a state of facts presents a case which entitles the party to relief in a court of equity. This precise question was answered in the negative by Chancellor Kent, in *Penny v. Martin* (1820) 4 Johns. Ch. 566; and the authority of that eminent jurist, and the force of the reasoning in the opinion in that case, would seem to be conclusive upon this point."<sup>28</sup>

### § 50. Equitable Cause of Action Must Concur with Absence of Legal Remedy.

It should be noted that the mere absence of a remedy at law is not always sufficient to entitle the plaintiff to maintain his suit in equity, for it may possibly be that the plaintiff does not have a good cause of action against the defendant either at law or in equity. With the absence of legal remedy there must concur an actual equitable cause of action in favor of the plaintiff and against the defendant.

*Young v. Porter* (1878) 3 Woods, 342, Fed. Cas. No. 18,171: The plaintiff, having an equitable title to land good as against C, filed a bill in equity to recover that land of B, the latter being at that time in possession. The bill did not allege that the defendant B had the legal title or that he had acquired possession under any person who had the legal title. Nor, so far as the allegations of the bill were concerned, did it appear that the defendant was in any way affected by the equity which the plaintiff attempted to set up. It was held that the bill was not maintainable. The proper course for the plaintiff to pursue in such case was to establish the legal title against C, if possible, and then to bring ejectment at law against the possessor, B, in which action the latter would have an opportunity to plead innocent purchase.

<sup>27</sup> *Mason v. Eldred* (1867) 6 Wall. 231, 18 L. ed. 783, overruling *Shesby v. Mandeville* (1810) 6 Cranch, 285, 3 L. ed. 215.      <sup>28</sup> *United States v. Ames* (1878) Fed. Cas. No. 14,440.

§ 51. Equity Devoid of Jurisdiction over Simple Breach of Contract.

The remedy for a breach of a contract or for tort is by an action at law, and the court of equity ordinarily has no jurisdiction to entertain a suit for the damages resulting therefrom.<sup>29</sup> A bill in equity cannot be maintained upon a cause of action to recover damages caused by fraudulent representation, such a cause of action being cognizable in a court of law.<sup>30</sup> Nor can equity assume jurisdiction over a mere matter of contract by reason of the fact that the particular wrong complained of is a refusal on the part of the defendant to permit the plaintiff to go ahead and perform.<sup>31</sup>

1. *Pettin v. Taylor* (1849) 7 How. 132, 12 L. ed. 637: The purchaser of land being in possession filed a bill to restrain the collection of the purchase money. The grounds alleged were (1) want of title in the vendor at the time of the sale and (2) his subsequent insolvency. There was no charge of fraud or misrepresentation. It was held that the plaintiff's remedy was at law on the covenants contained in the deed, and that equity had no jurisdiction.<sup>32</sup>

2. *Sawyer v. Atchison etc. R. Co.* (1904; C. C. A.) 63 C. C. A. 602, 129 Fed. 100, (1902) 119 Fed. 282: The plaintiff alleged that he was a creditor of the defendant company by reason of its guaranty of negotiable bonds issued by the Colorado Midland. The bonds were in possession of the Central Trust Co., having been placed there by the plaintiff for certain uses. The bill alleged that the Colorado Midland was defunct and that the defendant guarantor had denuded itself of all its property by transferring the same to another company. It was alleged that the trust company was wrongfully withholding plaintiff's bonds. The bill sought to recover possession of the bonds from the trust company and to enforce the liability of the guarantor against the property of the transferee company. It was held that the bill was multifarious and furthermore that the plaintiff's remedy was at law. Said the court: "His remedy against the trust company is by an action at law in trover or replevin, and his remedy against the railroad company is by an action at law upon the guaranty. No action can be maintained against the trust company and the railroad company jointly, because the latter has taken no part in the conversion of the complainant's bonds, and the former is not a party to the guaranty. The fact that it may be difficult to prove the value of his bonds or of the guaranty in an action against the trust company does not supply a reason for resorting to a court of equity to recover of the trust company."

It was admitted that after recovering a judgment at law against the railroad company, the plaintiff would have a right to come into equity to reach the property of the transferee company.

§ 52. Existence of Trust or Other Title to Equitable Relief.

While the remedy for the recovery of any pecuniary demand, whether arising from breach of contract or tort, is ordinarily by an

<sup>29</sup> *Scott v. Neely* (1901) 140 U. S. 112, 25 L. ed. 351.

<sup>30</sup> *Martin v. Wilson* (C. C. A.; 1907) 155 Fed. 97.

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<sup>31</sup> *Strang v. Richmond etc. R. Co.* (1900) 41 C. C. A. 474, 101 Fed. 511.

<sup>32</sup> *Noonan v. Lee* (1892) 2 Black 499, 17 L. ed. 278.



action at law, if in addition to the recovery of money the plaintiff seeks to establish and enforce a trust in his favor, and to obtain a sale of property to satisfy his claim, equity has jurisdiction;<sup>23</sup> and the presence of any distinct and sufficient title to equitable relief will give the court of equity jurisdiction over a matter of the breach of contract or tort; as where the controversy, in addition to the breach of contract or tort, involves a matter of equitable lien,<sup>24</sup> or trust; or where the controversy involves the rights of different persons, or is otherwise too complicated for a court of law.

1. *Hunter v. Robbins* (1902) 117 Fed. 920: The bill was filed against an erst-while treasurer of a railroad company to recover funds received by him in his official capacity, but unaccounted for. A bank was joined as defendant, upon the allegation that it had colluded with the individual defendant and had permitted him to withdraw funds from his account in the bank as treasurer and had permitted him to redeposit the same in another capacity, with fraudulent intent to assist him in appropriating the fund to his own use. It was objected that the plaintiff had a sufficient remedy at law, but it was held that the bill could be maintained. Said the court: "Were this a bill to seek to recover the funds from the former treasurer alone, the remedy at law would be adequate and complete; but the main object of this bill is to charge the defendant bank as a trustee."

2. *Missouri Broom Mfg. Co. v. Guymon* (1902; C. C. A.) 53 C. C. A. 16, 115 Fed. 112: The vendor of a lot of broom corn filed his bill to rescind the sale and recover the property, alleging that the sale was induced by the fraud of the vendee and that the latter had no intention, at the time of the purchase, of paying therefor. It was insisted for the defendant that the legal remedy by replevin was entirely adequate. But it was held that the court of equity had jurisdiction. Said the court: "The fact that the fraudulent vendee, when the election to rescind is made, occupies the position of a trustee, should dispose of a court of chancery to assume jurisdiction, on the ground of declaring and enforcing the trust, unless the transaction is a very simple one, which can be investigated readily by a court of law and tried to a jury. In the case before us the bill alleged that such part of the broom corn as had not been worked up into brooms had been mingled by the broom company with other broom corn, which, as a matter of course, rendered it difficult of identification. It was also disclosed by the bill that the property had been twice sold, and that the rights of the alleged purchasers would be a subject-matter for careful investigation. It was also charged in the bill that a part of the commodity had been manufactured into brooms, and consigned to third persons, who were acting in collusion with the broom company, and who were chargeable, as fraudulent trustees, with the property, or the proceeds thereof, which they had received. It was obvious, therefore, that the complainant could not obtain complete relief by a single action in replevin, such as he could obtain by the more flexible processes of a court of equity."<sup>25</sup>

<sup>23</sup> *Townsend v. Vanderwerker* (1895) 160 U. S. 171, 40 L. ed. 393, 16 Sup. Ct. 258.

<sup>24</sup> *Walker v. Brown* (1897) 166 U. S. 654, 41 L. ed. 905.

<sup>25</sup> A bill seeking relief against a sale procured by fraud is not demurrable on the ground that there is an adequate remedy at law, where it appears that the procedure in equity affords a more

3. *Atna Life Ins. Co. v. Lyon Co.* (1890) 44 Fed. 329, (1897) 82 Fed. 929, (1899) 95 Fed. 325: A county issued bonds for a certain sum, part of which went beyond the constitutional limit of indebtedness. In an action at law the payment of the bonds was resisted for the reason stated, but inasmuch as it appeared that part of the bond issue was good, a judgment was entered for defendant without prejudice in order that the plaintiff might be at liberty to sue in equity. A suit in equity was then brought by the bondholders in order to have an accounting as to the valid and invalid portion of the bonds and judgment for such portion as was good. It was held to be a proper case for the exercise of equitable jurisdiction.

4. *Hedlund v. Dewey* (1900) 105 Fed. 541: A receiver filed a bill against a quondam stockholder of a national bank and sought to have the transfer of stock by which he had ceased to be a stockholder set aside because colorable and intended merely to enable the stockholder to evade his liability. The bill asked that said stockholder's name be re-entered in the stock book as holder of that stock. It also prayed for a money decree to the extent of the legal liability. It was objected that the remedy was at law, inasmuch as the receiver could ignore the transfer and recover if he could show the transfer to be fraudulent or colorable. But it was held that equity had jurisdiction by reason of the particular relief sought, although the recovery of the damages was the actual object of the suit.<sup>36</sup>

### § 53. Other Illustrations.

In the following cases liability arose from a breach of contract but the court of equity was held to have jurisdiction because of some circumstance, connected with the cause, which rendered the legal remedy impracticable and inadequate.

1. *Walla Walla v. Walla Walla Water Co.* (1898) 172 U. S. 1, 43 L. ed. 341: An incorporated city made a contract with a water company for supplying water. Subsequently, the city proposed to build water works for itself. The water company thereupon filed a bill for an injunction, claiming that the operation of water works by the city would be in violation of the company's contract to supply water. It was insisted for the city that if this were so, the plaintiff's remedy would be in a court of law, to recover damages for the breach. But it was held that the suit disclosed matter of equitable cognizance.<sup>37</sup>

2. *Everett v. Independent School District* (1901) 109 Fed. 697: Bonds were efficient relief than would an action at law. *Refining Co. v. Fancher* (1895) 145 N. Y. 552, 556, 557, 40 N. E. 206, 27 L.R.A. 757; *Morse v. Nicholson* (1897) 55 N. J. Eq. 705, 38 Atl. 178.

<sup>36</sup> In *Godfrey v. McConnell* (1906) 151 Fed. 783, it was held that a bill could not be maintained by a stockholder in right of the corporation against directors and others who had co-operated to defraud it, where a decree for damages was the only relief sought. The plaintiff had, it was said, an adequate remedy at law. The court, however, did not advert to the difficulty that might be encountered in a court of law in giving effect to the right of action, arising from the triple relation of the parties and from the fact that the action is in fact the action of the corporation. Would the stockholder be permitted to sue at law in the name of the corporation?

<sup>37</sup> *Accord*, *Defiance Water Co. v. City of Defiance* (1898) 90 Fed. 759.

issued by a school district. Afterwards this school district was subdivided into a number of other districts, and under the statutes of the state the entire indebtedness of the old district became chargeable to the new districts severally in equitable proportions. It was held that the court of equity had jurisdiction of a suit to apportion the debt among the districts and to give judgment in favor of the bondholders. Between the bondholders and the new districts there was no privity of contract such as would enable the plaintiff to bring an action at law.

3. *Barrett v. Twin City Power Co.* (1902) 118 Fed. 361, (1903) 61 C. C. A. 222, 126 Fed. 309; The owner of options for land located on a river assigned the same to the promoters of a power company with the understanding that he was to be given bonds of the company or, failing that, to be paid in cash. The promoters failed to carry out their agreement, and the plaintiff filed a bill in which he sought to protect his rights under the options, demanding the fulfillment of the contract. Inasmuch as the options were about to expire, a receiver was asked for to conserve the property and interests of all parties. It was objected that the wrong complained of was a mere breach of contract and that the plaintiff's remedy was at law. In view of the special relief sought and in view of the shortness of the time before the options would expire, the objection was overruled.

4. *Nescomb v. Mutual Life Ins. Co.* (1878) Fed. Cas. No. 10,147: There had been several transfers or assignments of a life insurance policy and the various parties had thereby acquired conflicting interests in its proceeds. It was held that equity had jurisdiction to entertain a bill to settle the rights of all the parties, though ordinarily the assignee of a policy would be required to sue at law.

### § 54. Equitable Jurisdiction to Enforce Promise for Benefit of Stranger.

Where a promise inures to the benefit of one who is a stranger to the consideration, as for instance where a purchaser of land assumes a mortgage and promises to pay the debt due to the mortgagee, equity has jurisdiction of a suit brought by such stranger to the consideration to enforce the contract, there being no remedy at law in the particular jurisdiction. The question whether the remedy is at law or in equity on such a promise is governed by the law of the place where the suit is brought.<sup>22</sup>

*Central Electric Co. v. Sprague Electric Co.* (1902; C. C. A.) 57 C. C. A. 107, 120 Fed. 925: The plaintiff below was the creditor of a corporation all of whose debts, it was alleged, had been assumed by the defendant corporation. The action was brought to enforce the debt in question against the company that had assumed to pay the same. It was held that the question whether the proceeding should be at law or in equity depended upon the law of the forum. In states where parties not in privity with the consideration can recover at law on a contract made for their benefit, the action, if brought in the federal courts, should

<sup>22</sup> *Keller v. Ashford* (1890) 133 U. S. 117; *Willard v. Wood* (1896) 164 U. S. 502, S. 610, 33 L. ed. 667; *Willard v. Wood* 41 L. ed. 531; *Benjamin v. Cavarese* (1890) 125 U. S. 208, 34 L. ed. 210; (1875) 2 Woods, 169, Fed. Cas. No. 10,147; *Union Mutual Life Ins. Co. v. Hamford* 1,300 (1892) 143 U. S. 187, 36 L. ed. 118;

be on the law side. In states where such an action at law cannot be maintained, the proceeding, if prosecuted in the federal court, should be brought in equity.

**§ 55. Suit by Legatee against Executor.**

The right of a legatee against an executor to recover a legacy is recognized as a case proper for equitable relief, there being no right to recover at law on such a claim where the executor has made no express promise to pay the legacy.<sup>20</sup>

**§ 56. Suit to Protect Estate of Married Woman.**

The property rights of a married woman are peculiarly within the protection of the court of chancery; and equity will entertain a suit brought in respect of her property in the name of herself and husband. The fact that an action at common law would lie in their name does not defeat the right to maintain the suit in equity, since the right of a married woman can be more fully protected in the equitable forum.

*Hunt v. Danforth* (1856) 2 Curt. C. C. 502, Fed. Cas. No. 6,887: A married woman filed a bill, her husband joining in the suit, to recover property that had been settled on her to her sole and separate use. It was insisted that they had an adequate remedy at law in an action brought in the joint names of the husband and wife, but it was held not so. Said Curtis, Circuit Justice: "The right of a feme covert to receive and enjoy a sum of money to her separate use cannot be deemed sufficiently protected by a suit at the common law in the joint names of her husband and herself. Such a suit reduces the chose in action to his possession, not to hers. And so far from its being the only remedy for the recovery of money due to the wife under a trust for her sole use, I apprehend a court of equity would enjoin the husband, on the application of the wife, from prosecuting such a suit, if he were to commence one."

**§ 57. Equitable Title to Legal Right of Action.**

The acquisition of an equitable title to a purely legal right of action does not always entitle the holder of such equitable title to sue in equity. Thus, where a city became obligated by contract to pay rents for hydrants to a water company, and the company executed a trust deed on all its property, including rents, revenues, and income, and the trustee named in the trust deed afterwards brought suit to foreclose the same, it was held that in this foreclosure suit the trustee could not recover a judgment against the city on the claim for water rents. In discussing this point the court said: "The assignee of a chose in action, or any *cestui que trust*, cannot sue in equity merely

<sup>20</sup> *Mayer v. Foulkrod* (1923) 4 Wash. Mason, 95; *Domestic etc. Soc. v. Gaither* C. C. 949; *Pratt v. Northam* (1828) 5 (1894) 62 Fed. 422.

because his interest is equitable. If it be conceded that the trustee in this case acquired the legal title, and had a right in his own name to sue the city upon the contract, it was a right to sue at law, and not in equity."<sup>40</sup>

### § 58. Right to Have Discovery as Affecting Jurisdiction.

Courts of equity will not assume jurisdiction to render a money judgment for a breach of contract on the ground that, in the prosecution of an action at law on such contract, the aid of equity would be needed to enforce discovery. Such aid in the federal courts must be sought in separate proceedings, to the end that the right of trial by jury in the legal action may be preserved intact.<sup>41</sup> Besides, the federal courts, sitting as courts of law, are endowed by statute with ample power to enforce all necessary discovery in proceedings before them.

*India Rubber Co. v. Consolidated etc. Co.* (1902) 117 Fed. 354: The bill sought a recovery of damages for a breach of contract. The claim to equitable jurisdiction was based on the fact that the contract alleged to have been violated contained a provision for an inspection of books by the plaintiff in order that the amount of liability under the contract might be properly ascertained. It was insisted that the court of equity had jurisdiction to enforce this provision for discovery and that, having thus acquired jurisdiction, it would determine the whole controversy and award damages for the breach. But it was held otherwise.<sup>42</sup>

### § 59. Jurisdiction in Cases of Trespass.

A court of equity has no jurisdiction to enjoin a single trespass on agricultural lands where the probable injury is not shown to be destructive of any part of the real property, or irremediable. The remedy is by action at law. Furthermore where equitable aid is invoked on the ground of irremediable injury, the allegations of fact must be such that the court can see from the nature of the contemplated wrong that irremediable mischief may reasonably be expected to follow from the threatened injury.<sup>43</sup>

### § 60. In Ejectment Suit Remedy Is at Law.

Where a suit is in the nature of an ejectment and no particular ground of equitable jurisdiction is stated, the remedy is at law: a

<sup>40</sup> *City of Eau Claire v. Payson* (1901) 46 C. C. A. 466, 107 Fed. 552. <sup>41</sup> *Hartford Rubber Works Co. v. Consolidated etc. Co.* (1902) 117 Fed. 1008. (1901) 48 C. C. A. 608, 109 Fed. 576. <sup>42</sup> *Indian Land & Trust Co. v. Shoen-*

<sup>43</sup> *Scott v. Neely* (1891) 140 U. S. felt (1895) 68 C. C. A. 196, 135 Fed. 107, 109, 36 L. ed. 358, 359. 484.

suit in equity will not lie to recover property that is in the possession of another under such circumstances as would enable the aggrieved person to bring his action of ejectment.<sup>44</sup>

1. *Johnson v. Munday* (1900; C. C. A.) 44 C. C. A. 64, 104 Fed. 594: An adverse claim having been filed in a government land office against certain parties entering a lode mining claim, a bill in equity was subsequently filed by the adverse claimant in order to assert his title. The bill relied upon a purely legal title acquired by a purchase at a sheriff's sale. It was held that the remedy was at law and that equity had no jurisdiction.

2. *McGuire v. Pensacola City Co.* (1901; C. C. A.) 44 C. C. A. 670, 105 Fed. 677: A bill in the nature of an ejectment suit was brought by the plaintiff against many defendants who, it was alleged, had forcibly entered upon the premises in question and ejected the plaintiff. It was held that the remedy was at law; and also that, whether one or many suits at law would be necessary, equity had no jurisdiction.

### § 61. When Suit to Quiet Title Maintainable in Equity.

Connected somewhat with the rule that prevents the bringing of a suit in equity in the nature of ejectment to recover the possession of land, is another rule to the effect that a suit in equity will not lie to quiet the title to land where the plaintiff can maintain his ejectment at law. For this reason, as a general rule, a bill to quiet title can be maintained only by one who alleges himself to be in possession; or at least, if he is shown to be out of possession, he must show some other title to equitable relief than that which arises from the fact that he is out of possession. Under the jurisdiction and practice in equity, independently of statute, a bill to remove a cloud on title, which avers no facts conferring the right to other equitable relief, must show that the plaintiff has the legal title to the land and that he is in possession. The bill cannot be maintained without clear proof of both possession and legal title in the plaintiff. If plaintiff's title is legal, and he is out of possession, his remedy is at law, by ejectment. If his title is equitable, and not such title as will support ejectment, he must first acquire the legal title and bring ejectment.<sup>45</sup> A party out of possession and holding legal title to land cannot main-

<sup>44</sup> *Lacasse v. Chapuis* (1892) 144 U. S. 119, 30 L. ed. 368; *Black v. Jackson* (1900) 177 U. S. 349, 361, 44 L. ed. 1012; *U. S. v. Wilson* (1886) 118 U. S. 801, 806; *Gordon v. Jackson* (1896) 72 Fed. 86, 89, 6 Sup. Ct. 991, 30 L. ed. 110, 112; *Randolph v. Allen* (1896) 19 C. C. A. 353, 73 Fed. 23; *Morrison v. Marker* (1899) 93 Fed. 692; *Hanley v. Coal Co.* (1901) 110 Fed. 62; *Gas Co. v. Miller* (1899) 96 Fed. 12, 23. <sup>45</sup> *Frost v. Spitley* (1887) 121 U. S. 552, 556, 7 Sup. Ct. 1129, 30 L. ed. 1010.



diction to attach, the suit to quiet title will be entertained, though the plaintiff is not in possession.

*Peck v. Ayers & Lord Tie Co.* (1902; C. C. A.) 53 C. C. A. 551, 116 Fed. 273: A bill was filed to quiet title and to have an injunction against waste and destruction of the premises in question, also for an accounting. In its aspect as a bill to quiet title jurisdiction was wanting, because the plaintiff was shown not to be in possession. But on the point of the injunction, the equity jurisdiction was clear. Having thus acquired jurisdiction of the cause, it was held that the question of title could properly be adjudicated, that being proper in order to prevent a multiplicity of suits, and indeed being in a measure necessary to the determination of the question of injunction.

### § 63. Effect of State Statutes.

The general rule that a bill to quiet title will not lie unless the plaintiff is already in possession has been considerably upset by the recognition of the qualifying principle that the federal courts will give effect to a local statute allowing such a bill to be maintained without an allegation of actual possession in the plaintiff.<sup>50</sup> The idea here is that, in authorizing such a bill, the local statute creates a right and remedy which it is the duty of the federal courts to recognize. Some difficulty has been experienced in applying this doctrine, and as a result not a little confusion is found in the decisions. The question involved is one of law rather than of mere practice, and we shall not here enter on an attempt to work the question out in detail. Pertinent cases will be found cited in another connection.<sup>51</sup>

### § 64. Jurisdiction in Suits for Accounting.

Among the most prominent heads of equity jurisdiction is that of accounting. Where a suit involves an accounting of many items of income and expense, equity assumes jurisdiction almost as a matter of course. No remedy at law is adequate which requires the submission of matters of account to a jury.<sup>52</sup> In such causes the remedy in equity is more complete and efficient, and better adapted to attain the ends of justice, than the remedy at law.<sup>53</sup>

<sup>50</sup> *United States v. Wilson* (1886)

173 U. S. 86, 89, 30 L. ed. 110, 112;

*Holland v. Challen* (1884) 110 U. S. 15,

38 L. ed. 52; *Reynolds v. Crawfordsville*

*Bank* (1894) 172 U. S. 405, 23 L. ed.

768; *Chapman v. Brewer* (1885) 114

U. S. 353, 32 L. ed. 83.

<sup>51</sup> See ante, §§ 27, 28, 29.

<sup>52</sup> *Hayden v. Thompson* (1895) 71

Fed. 60, 17 C. C. A. 592; *Gunn v. Brink-*

*ley Car Works* (1895) 68 Fed. 382, 13

C. C. A. 529; *Fechter v. Palm Bros.*

(1904) 133 Fed. 462, 86 C. C. A. 336.

<sup>53</sup> *Castle Creek Water Co. v. City of*

*Aspen* (C. C. A.; 1906) 76 C. C. A. 516,

146 Fed. 8, 9.



### § 65. Intricacy of Accounts as Affecting Equity Jurisdiction.

Where the transactions out of which liability is alleged to have arisen appear to be so intricate and complicated that a jury sitting in the ordinary way in a trial at law could not reasonably be expected to remember the details and digest all the evidence necessary to do complete justice between the parties, the remedy at law is inadequate, and equity will assume jurisdiction and enforce an accounting.<sup>54</sup> Equity has jurisdiction of a bill for an accounting filed against an executor by legatees and devisees.<sup>55</sup>

### § 66. Conditions under Which Creditors' Bill Lies.

Generally speaking, a creditors' bill cannot be maintained in the federal court unless the plaintiff has first obtained a prior judgment in a legal proceeding.<sup>56</sup> In the absence of a specific lien or other independent ground for equitable intervention, a general creditor cannot maintain a bill to reach and subject the property of his debtor until he has first obtained a judgment at law. This principle is rigorously enforced in the federal courts, because, it is said, the debtor has a right to have a jury pass on the question of the existence of the debt, and this right would be lost if the federal court of equity were to assume the jurisdiction before judgment at law.

### § 67. Effect of State Laws.

A state statute expressly giving the right to maintain a creditors' bill before judgment at law will not be applied by the federal court of equity sitting in that state. Hence the federal court will remand such a suit where it has been removed from the state court.<sup>57</sup>

1. *Hollins v. Brierfield Coal & Iron Co.* (1893) 150 U. S. 371, 37 L. ed. 1113: Creditors having claims against an insolvent corporation filed a creditors' bill to reach and apply its assets. Said Mr. Justice Brewer: "The plaintiffs were

<sup>54</sup> *Fidelity & Deposit Co. v. Fidelity Trust Co.* (1906) 143 Fed. 169.

<sup>55</sup> *Pulham v. Pulliam* (1879) 10 Fed. 23.

<sup>56</sup> *Smith v. Railroad Co.* (1878) 99 U. S. 398, 25 L. ed. 437.

<sup>57</sup> *Cates v. Allen* (1893) 149 U. S. 451, 37 L. ed. 804; *Scott v. Neely* (1891) 140 U. S. 106, 35 L. ed. 358; *Smith v. Railroad* (1878) 99 U. S. 398, 25 L. ed. 437; *Jones v. Green* (1863) 1 Wall. 330, 17 L. ed. 543. In *England v. Russell* (1896) 71 Fed. 818, a statute of Ohio was in question. In addition to giving the right to general creditors to file a bill to reach property fraudulently conveyed away by the debtor, the statute provided that the probate court should have authority to appoint a trustee to recover possession and administer the property for the benefit of creditors. It was held that this did not create any distinct equitable right such as would authorize the federal court to entertain the creditors' bill contrary to the rule stated in *Cates v. Allen*, *supra*, and like cases.

simple contract creditors of the company; their claims had not been reduced to judgment, and they had no express lien by mortgage, trust deed, or otherwise. It is the settled law of this court that such creditors cannot come into a court of equity to obtain the seizure of the property of their debtor, and its application to the satisfaction of their claims; and this, notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. The line of demarcation between equitable and legal remedies in the federal courts cannot be obliterated by state legislation. Nor is it otherwise in case the debtor is a corporation, and an unpaid stock subscription is sought to be reached.<sup>58</sup> Nor is this rule changed by the fact that the suit is brought in a court in which at the time is pending another suit for the foreclosure of a mortgage or trust deed upon the property of the debtor."

2. *Emsheimer v. New Orleans* (1900) 116 Fed. 893 (1902) 186 U. S. 33, 46 L. ed. 1042: Creditors of the city of New Orleans (as that corporation was formerly constituted under the laws of Louisiana) had legal remedies for the enforcement of their debts. The legislature of the state thereupon abolished the metropolitan police board and created a new municipal corporation. It was held that this legislation in no way affected the rights or remedies of the creditors; that the new corporation was, in law, the representative of the old in respect of the duty to levy taxes and absolve its obligations, and that as a consequence the court of equity did not, merely by reason of this change in the corporate representative of the city, acquire jurisdiction to entertain a bill in the nature of a creditors' bill against the city to enforce the collection of the necessary taxes. The remedy remained at law as before.<sup>59</sup>

#### § 68. Creditor Otherwise without Remedy.

A state statute authorizing maintenance of a creditors' bill before the reduction of his claim to judgment by the plaintiff and a return of *nulla bona* will be construed to create a new right such as will give the federal court jurisdiction under the same conditions, provided it appears that such creditor is otherwise without remedy.<sup>60</sup>

#### § 69. Jurisdiction as Affected by Admissions of Answer.

The mere fact that the answer admits the plaintiff's claim does not justify the equity court in entertaining a suit filed by a general creditor to reach and subject property fraudulently conveyed away by his debtor. It is a question of jurisdiction, and to support the jurisdiction there must be something in the subject-matter which is of equitable cognizance.<sup>61</sup>

<sup>58</sup> *National Tube Works Co. v. Ballou* (1896) 71 Fed. 758, (1896) 74 Fed. 417, (1892) 146 U. S. 517, 36 L. ed. 1070; 20 C. C. A. 591.

*Swan Land & Cattle Co. v. Frank* (1893) 148 U. S. 603, 812, 37 L. ed. 577, 580. <sup>60</sup> *Darragh v. H. Wetter Mfg. Co.* (1897) 23 C. C. A. 609, 78 Fed. 7.

<sup>61</sup> *Compare New Orleans v. Benjamin* (1894) 153 U. S. 411, 38 L. ed. 764, 818. *England v. Russell* (1896) 71 Fed. (1898) 169 U. S. 181, 42 L. ed. 700,

### § 70. Equitable Jurisdiction over Partition Suits.

Courts of equity have assumed a general jurisdiction, concurrent with that of the courts of law, in matters of partition. Hence a partition bill can be maintained in the federal courts of equity without stating any particular ground for equitable interference.<sup>62</sup> But such a bill will be entertained only in conformity with the principles of equity jurisprudence as they formerly existed in England and as subsequently enforced in the federal courts. One such principle is found in the rule that a plaintiff cannot maintain a bill for partition unless he has a legal title to the interest that he claims. The holder of a mere possessory interest cannot maintain a partition bill.<sup>63</sup>

### § 71. Jury Trial as Affecting Method of Procedure.

In actions at law for partition there must be a jury trial, in equity this is not necessary. Therefore where a state statute has provided for partition proceedings without a jury and a party seeks to conduct proceedings in the federal court in conformity with the state statute, such proceedings must go to the equity side. If they are conducted on the law side and without a jury trial, the case will be dismissed.<sup>64</sup>

### § 72. Equitable Jurisdiction to Restrain Enforcement of Tax Laws.

If the tax laws of a state or of the United States do not afford any adequate remedy at law available to one whose property is unlawfully or unjustly taxed, the federal court of equity will assume jurisdiction to enjoin the enforcement of the tax;<sup>65</sup> but the mere illegality of a tax, or the mere fact that a law upon which the tax is founded is unconstitutional, does not entitle a party to relief by injunction against proceedings under the law. It must appear that the party has no adequate remedy by the ordinary processes of the law, or that the case falls under some other recognized head of equity jurisdiction, such as multiplicity of suits or irreparable injury.<sup>66</sup>

<sup>62</sup> *Smelting Co. v. Rucker* (1896) 28 U. S. 73, 44 L. ed. 377; *Pittsburgh, etc. Fed. 226*, *Daniels v. Benedict* (1892) 50 U. S. 32, 43 L. ed. 254; *Rich v. Braxton* Fed. 347.

<sup>63</sup> *Strettell v. Ballou* (1881) 9 Fed. (1895) 158 U. S. 375, 39 L. ed. 1022; *Ogden City v. Armstrong* (1897) 168 U. S. 224, 42 L. ed. 444; *Express Co. v. A. 661*, 65 Fed. 393, reversing (1894) 12 C. C. A. 653, 65 Fed. 373.

<sup>64</sup> *Kleever v. Seawall* (1895) 12 C. C. A. 661, 65 Fed. 393, reversing (1894) 12 C. C. A. 653, 65 Fed. 373.

<sup>65</sup> *Louisville Trust Co. v. Stone* (1901) 46 C. C. A. 299, 167 Fed. 305; *Georgetown* (1872) 15 Wall. 547, 21 L. ed. 231; *Dows v. City of Chicago* (1871) Bank v. Stone (1898) 88 Fed. 383.

<sup>66</sup> *Cruickshank v. Bidwell* (1900) 176 11 Wall. 168, 20 L. ed. 65.

1. *Cummings v. National Bank* (1870) 101 U. S. 153, 22 L. ed. 902: A bank filed a bill to prevent the collection of a tax wrongfully assessed by the state against the shares of its stockholders, which the bank was required to pay. It was held that the fiduciary character in which the bank stood to its stockholders entitled it to come into the court of equity for relief.

2. *Union Pac. Ry. Co. v. Okeyana* (1885) 113 U. S. 518, 22 L. ed. 1098: In addition to the illegality of the tax it was alleged, as a circumstance entitling the plaintiff to come into equity, that if the tax was not enjoined, its collection would involve the plaintiff in a multiplicity of suits as to the title of lots laid out and sold, would prevent the sale of some of the lots, and would cause a cloud to be fixed on the title. It was held that this was sufficient to justify equitable intervention. Said Mr. Justice Bradley: "It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief."

### § 73. Effect of Provision Allowing Action to Recover Tax.

Where the tax laws permit a taxpayer to sue after payment to recover a questionable tax assessed to him, such remedy is usually considered adequate; and equity will not ordinarily entertain a suit to enjoin the tax.<sup>97</sup>

1. *Snyder v. Marks* (1883) 109 U. S. 189, 27 L. ed. 901: A tax was assessed under the internal revenue laws of the United States. In a suit to restrain the collection of the tax, it was held that equity had no jurisdiction. The exclusive remedy was by action at law to recover the tax after payment, as provided in the revenue laws.

2. *Shelton v. Platt* (1901) 189 U. S. 501, 25 L. ed. 273: The tax laws of the state of Tennessee provide as the exclusive remedy of a taxpayer who wishes to question the legality of taxes assessed against him, that such taxpayer shall first pay the tax under protest and then sue to recover the same. It is held that this is an adequate remedy at law.

3. *Indiana Mfg. Co. v. Kockne* (1903) 189 U. S. 681, 47 L. ed. 651: Under the tax laws of Indiana, a taxpayer who questions the right of the commonwealth to tax his property, must appear before the board of review when the assessment is made and object to it. If his objections are here overruled he should then appeal

<sup>97</sup> *Schulkenberg-Brockeler Co. v. Hayward* (1884) 20 Fed. 422.

to the state board, and if unsuccessful there, he must pay the tax and sue to recover. This procedure constitutes an adequate remedy at law, and equity will not entertain a bill to enjoin the tax. In regard to the contention that to enforce the tax by a distraint and sale of plaintiff's property would result in irreparable injury, it was observed that such injury could not be inferred where the plain and adequate remedy by payment and suit to recover was given by statute.<sup>68</sup>

### § 74. Jurisdiction of Suit to Test Rate Laws.

A bill in equity is the appropriate remedy for determining a controversy as to the constitutionality of a statute creating a board or commission charged with the duty and clothed with the power to regulate or reduce the rates charged to patrons or consumers by public corporations, such as railways and gas and power companies. The reason why the bill in equity is here necessary is that only in such a suit can the rights of the public as well as of the complaining company be protected.<sup>69</sup> By a parity of reasoning, it has been held that the action at law does not afford an appropriate means for testing the constitutionality of such laws.

1. *Haverhill Gaslight Co. v. Barker* (1901) 109 Fed. 694: The plaintiff filed its bill against a gas commission created by state legislation and charged with the duty of fixing the prices of gas. The purpose was to enjoin the enforcement of an order, about to be issued, prohibiting the collection by the gas company, from its customers, of more than the charges fixed by the commission. The order, it was alleged, would have the effect of depriving the plaintiff of its property without process of law, and in contravention of the Fourteenth Amendment. The grounds of equity jurisdiction relied on were multiplicity of suits and irreparable injury. It was held that the bill would lie. Said the court, *inter alia*: "The suits which the bill alleges will be multiplied are those between the company and its consumers. These may be either suits brought by the company to

<sup>68</sup> The decision in this case is apparently less favorable to the taxpayer than in *Bank v. Stone* (1898) 88 Fed. 383, affirmed, on appeal, by a divided court. *Stone v. Bank* (1899) 174 U. S. 799, 43 L. ed. 1187. In this case the circuit court of appeals granted an injunction against the enforcement of a tax where the state law required (1) that the taxpayer against whom illegal taxes were assessed should refuse to pay the tax, unless he was threatened with an actual distraint of his property, (2) thereupon he might pay the tax and sue to recover it. It was held that there was no adequate remedy at law.

<sup>69</sup> *St. Louis etc. Ry. Co. v. Gill* (1905) 156 U. S. 649, 39 L. ed. 567; *Chicago etc. Ry. Co. v. Minnesota* (1900) 184 U. S. 418, 33 L. ed. 970; *Railroad Commission Cases* (1896) 116 U. S. 307, 29 L. ed. 636; *Dow v. Beidelman* (1888) 125 U. S. 681, 31 L. ed. 841. A bill in equity, brought against state officials to restrain the enforcement of a statute passed or of an order made in contravention of the Fourteenth Amendment of the Constitution, is not excluded from the jurisdiction of the federal courts by the terms of the Eleventh Amendment. *Railroad Commission Cases* (1896) 116 U. S. 307, 6 Sup. Ct. 334, 29 L. ed. 636; *Reagan v. Trust Co.* (1894) 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; *Smyth v. Ames* (1896) 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Id.* (1898) 171 U. S. 361, 18 Sup. Ct. 888, 43 L. ed. 197; *Railroad Co. v. Tompkins* (1900) 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417.

collect gas rates, or suits brought by the consumers against the company to compel the company to supply gas at the rates fixed by the order of the commission. These are not suits to be brought by parties to this bill, but that does not appear to be necessary in order that multiplicity of suits may furnish a basis for a bill in equity."<sup>10</sup>

2. *Chicago, etc., R. Co. v. Wellman* (1892) 143 U. S. 339, 36 L. ed. 176: This was a contest over the validity of an act of a state legislature fixing the rate to be charged by railroads for passenger transportation. A passenger sought to buy a railroad ticket at the rate fixed. The company refused to sell at that rate, and the passenger immediately brought an action for damages. At the trial, counsel for the road requested the court to charge that the legislation in question was unconstitutional; but the court charged, on the contrary, that the law was valid. This ruling was upheld by the supreme court. The record did not contain matter sufficient to show that the legislation was invalid. A perusal of the opinion in this case will show that the action at law is not adapted to raising the issues and presenting the facts such as would enable a court to pass intelligently on the question here proposed to be raised.

#### § 75. Public Interest as Affecting Jurisdiction of Court of Equity.

The equitable jurisdiction over a legal controversy may be assumed when in addition to the consideration of preventing a multiplicity of suits there is the further circumstance that, by assuming such jurisdiction, the general public interest is subserved and the possibility of public disturbance incident to the enforcement on the plaintiff's legal rights is removed.

1. *Detroit v. Detroit etc. Ry. Co.* (1902) 184 U. S. 368, 46 L. ed. 592: By an ordinance of the common council of the city of Detroit, fares on the various city railways were materially reduced. The operating company questioned the validity of the ordinance on the ground of the impairment of the obligation of contract and filed a bill to enjoin the city from attempting to enforce the ordinance. In considering the question whether the subject was of equitable cognizance, the court observed that the plaintiff's remedy at law was inadequate. If it refused to abide by the ordinance, it might be harassed by many suits at the instance of different individuals and thus subjected to expensive litigation. Besides, the refusal of the company to make the reduction might well lead to disturbances in the street cars owing to the controversy over the fares. It was held that the bill in equity would lie.

2. *Cleveland v. Cleveland City Ry. Co.* (1904) 194 U. S. 517, 531, 48 L. ed. 1102, 1106: The case was similar to the Detroit case. It was said: "In view of the controversies, confusion, riots, and multiplicity of suits, which would necessarily have been occasioned by the resistance of the complainant to the enforcement of the ordinance, and in view of the public interests and the vast number of people to be affected, the case was one within the jurisdiction of a court of equity.

<sup>10</sup> *Smyth v. Ames* (1896) 169 U. S. 466, 517, 518, 18 Sup. Ct. 418, 42 L. ed. 819,

This conclusion is, we think, besides inevitable, when it is borne in mind that the ordinance in question did not purport to reduce rates of fare upon the consolidated line, but was made operative alone upon a section of that line, and, therefore, necessarily would have engendered the enforcement of two rates of fare over the same line, leading to consequences dangerous to the public interest, peace, and tranquillity, the extent of which it would be difficult in advance to perceive."

### § 76. When Rate Law May Be Questioned in Action at Law.

Where, instead of creating a board or other intermediary agent to regulate rates, the legislature acts directly on the subject and itself fixes a tariff of rates and prescribes penalties, there is no opportunity to resort to proceedings in equity, since there is no public functionary or commission which can be made to respond, and the state itself cannot be sued. It follows that in this class of cases, the company whose rates are regulated is free to raise the question of the reasonableness and validity of such statutory rates by way of defense in a legal action.<sup>71</sup>

### § 77. Jurisdiction of Suit to Protect Patent.

Whether a suit to protect a patentee in the use and enjoyment of his invention shall be at law or in equity is to be determined by the same principles that are applied in ordinary litigation. If he has an adequate remedy at law, he cannot resort to equity for relief any more than suitors in other departments of jurisprudence.<sup>72</sup> When a patent has expired or when circumstances are such as not to entitle the patentee to injunctive relief against infringement, a court of equity will not entertain a bill for the sole purpose of an accounting for damages sustained by a past infringement, or for profits realized by an infringer.<sup>73</sup>

### § 78. Remedy when Property Taken under Process.

The following two cases turned upon the question of the adequacy of the remedy of replevin as a means of recovering property alleged to have been improperly seized in execution. In the first case it was

<sup>71</sup> *St. Louis etc. Ry. Co. v. Gill* 261, 153 Fed. 177, 180; *Root v. Railway* (1896) 156 U. S. 649, 656, 39 L. ed. 567, 573; *Co. (1881)* 105 U. S. 189, 26 L. ed. 975.

<sup>72</sup> *Deere & Webber Co. v. Dowagiac Mfg. Co. (C. C. A.; 1907)* 82 C. C. A. 251, 153 Fed. 177, 180. *Clark v. Wooster* (1886) 119 U. S. 322, 7 Sup. Ct. 217, 30 L. ed. 392; *Woodmanse & Hewitt Mfg. Co. v. Williams* (1895) 15 C. C. A. 530, 68 Fed. 489.

<sup>73</sup> *Deere & Webber Co. v. Dowagiac Mfg. Co. (C. C. A.; 1907)* 82 C. C. A. 251, 153 Fed. 177, 180. *Brown v. Lanyon* (1906) 78 C. C. A. 528, 148 Fed. 338.

held that the legal remedy was adequate; in the other it was held not to be adequate.

1. *Van Norden v. Morton* (1878) 99 U. S. 376, 25 L. ed. 453: A person whose dredge-boat had been seized under process of execution from the circuit court directed against another, filed a bill in that court to enjoin the marshal from interfering with him in the possession of the boat. It was held that the circuit court had no jurisdiction. In states where the common-law action of replevin or its equivalent exists, that action would afford a proper remedy. Besides, the plaintiff could sue at law in any state for the damage caused by the wrongful levy. Furthermore, in Louisiana where this particular action arose, there were statutory provisions giving a remedy at law in such case, and these provisions were enforceable in the law side of the federal court in the cause in which the execution issued.

2. *Krippendorf v. Hyde* (1884) 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. 27: Property in the possession of A was attached under process from a federal court directed against B. A claimed the property as his own and executed a delivery bond to the marshal conditioned to have the property forthcoming or to pay its value. A then disposed of the property and afterwards paid its value to the marshal. He then filed an ancillary bill against the marshal and all the creditors of B, parties to the original proceedings in the federal court, and asked that the marshal be enjoined from paying over that money to the creditors. The bill also prayed that the money in question be adjudged to be the money of A and that he be given judgment therefor. To this bill, it was objected that A had a remedy at law by replevin against the marshal to recover his property wrongfully taken under the process against B. But it was held by the supreme court that the remedy at law was unavailable, because the property in question was in custody of the federal court and, besides, A could not maintain replevin after the disposal of the goods.

### *Existence of Adequate Defense at Law.*

#### § 79. When Existence of Legal Defense Defeats Equitable Jurisdiction.

The existence of an adequate defense at law is to be treated and considered as being in like case with the existence of an adequate remedy at law, so far as concerns the jurisdiction of the federal court to entertain a suit in equity in regard to the same controversy. For instance, a party against whom a right of action at law is asserted and who has a good defense at law cannot maintain a suit in equity to get the benefit of the same matters that are available by way of defense in the legal action. This proposition can be most readily understood from the following illustration.

*Cable v. United States Life Ins. Co.* (1903) 191 U. S. 288, 48 L. ed. 188: An insurance company had issued a policy on the life of one C. After the death of the insured a suit at law was instituted on the policy by his administratrix. This suit was brought in the state court. Thereupon the insurance company,

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defendant in the action at law, filed a bill in the federal court, alleging that the issuance of that policy of insurance had been procured by fraudulent misrepresentations, and praying that the policy might be canceled. To this bill a demurrer was interposed, on the ground that, if the allegation of fraud was true, then the plaintiff in the bill had a good defense to the action at law, and the suit in equity was unnecessary and improper. Besides, it was insisted, to entertain this bill would deprive the defendant therein, being the plaintiff in the action at law, of the right to have a jury trial on the issue of fraud. It was held in the supreme court that the demurrer must be sustained.<sup>74</sup>

To the objection based on the circumstance that the action at law had been instituted in a state court, the supreme court answered that the defendant in that action could remove the cause to a federal court if it saw fit to do so, provided it had not voluntarily waived that right.

### § 80. Defense Must Be Available in *Præsent*.

Where an obligation, apparently valid, has not yet matured so that a suit can be brought on it forthwith, equity will entertain a bill to cancel or rescind it, though the plaintiff seeks equitable relief on a ground that would also be a good defense at law after maturity and suit brought thereon. The reason for the distinction is that, in this case, the defense does not exist in *præsent*, and hence it does not interfere with the equity of cancellation.<sup>75</sup>

### § 81. Existence of Additional Equity.

In any case where there is some other equity to support the bill in addition to the matter of fraud (available by way of defense in the action at law) the suit can be maintained. Thus, in a suit to rescind a contract on the ground of fraud, equity will assume jurisdiction, if the plaintiff shows a just ground for injunctive relief to prevent the defendant from deriving benefit from the contract pending the suit.<sup>76</sup> If a contract, a security, or an agreement, which the plaintiff seeks to

<sup>74</sup> *Reversing Insurance Co. v. Cable Smith* (1896) 73 Fed. 318; *Such v. New* (C. C. A.; 1900) 39 C. C. A. 264, 98 York State Bank (1904) 127 Fed. 450. Fed. 761. Two of the judges of the *See Mutual Life Ins. Co. v. Pearson* supreme court dissented. (1902) 114 Fed. 395, for a clear pre-

The question here involved is one on sentation of the reasons for the oppos- which there is diversity of opinion, but ing view. For the cases on both sides the weight of authority in the federal of the question see *Johnson v. Swanke* courts is in conformity with the pre- (1906) 128 Wis. 68, 5 L.R.A.(N.S.) vailing view. *Hoare v. Bremridge* 1048, and note thereto, in 8 Am. & Eng. (1872) L. R. 8 Ch. 26; *Insurance Co. Ann. Cas.* 548.

*v. Bailey* (1871) 13 Wall. 616; 20 L. <sup>75</sup> *Insurance Co. v. Stanchfield* (1870) ed. 501; *Grand Chute v. Winegar* (1872) 1 Dill. 424, Fed. Cas. No. 6,660; *Riggs* 15 Wall. 373, 21 L. ed. 174; *Home Ins. v. Union Life Ins. Co.* (C. C. A.; 1904) *Co. v. Stanchfield* (1870) 1 Dill. 424, 63 C. C. A. 365, 129 Fed. 207.

Fed. Cas. No. 6,660; *Manchester, etc.* <sup>76</sup> *Patton v. Glats* (1893) 56 Fed. *Ins. Co. v. Stockton, etc. Works* (1889) 367.

38 Fed. 378; *Ætna Life Ins. Co. v.*

cancel on the ground of fraud is negotiable, equity will entertain a suit for that purpose, when there is a possibility that the instrument in question might get into the hands of an innocent purchaser;<sup>77</sup> for in such event the defense at law would fail. A bill in equity will lie to cancel a forged note that is not yet due according to its tenor; and the statutes authorizing the perpetuation of testimony do not afford such an adequate remedy at law as will justify a court of equity in refusing to entertain a suit to cancel a forged note.<sup>78</sup>

**§ 82. Defense Available at Law by Way of Estoppel.**

The doctrine of equitable estoppel is nowadays everywhere as effective in actions at law as in suits in equity, and consequently where the only object of going into equity is to secure the benefit of such a defense, the court of equity will not entertain the suit, the plaintiff having a perfect defense at law.<sup>79</sup>

**§ 83. Defense Available by Way of Set-off.**

Where a plaintiff brings suit on the law side to recover on a note, the defendant may file a bill on the equity side to get the benefit of a set-off and an injunction against the prosecution of the suit at law for more than the balance; and this, though the defendant might, by a state statute, plead that set-off at law. The reason is that the subject of set-off is an original head of equity antedating the modern statutes of set-off, and therefore the equity jurisdiction is not taken away by such statutes.<sup>80</sup>

**§ 84. Counterclaim of Equitable Cognizance.**

Again, a counterclaim of purely equitable cognizance cannot be entertained in a suit at law at all. To get the benefit of this, the defendant must resort to equity. But where the counterclaim is in the nature of recoupment and goes solely in reduction or mitigation of the claim and arises out of the very subject-matter of the suit, there the claim can be considered in the legal action; and equity would not entertain a bill to give relief upon it.<sup>81</sup>

<sup>77</sup> *Louisville, etc. R. Co. v. Ohio Val. ley, etc. Co.* (1893) 57 Fed. 42. *Cleveland v. Cleveland etc. R. Co.* (1899) 93 Fed. 123; *National Nickel Co. v. Nevada Syndicate* (1901) 112 Fed. 46.

<sup>78</sup> *Schmidt v. West* (1900) 104 Fed. 272. *50 C. C. A. 113; Drexel v. Berney* (1883) 16 Fed. 522.

<sup>79</sup> *Dickerson v. Colgrove* (1879) 100 U. S. 578, 25 L. ed. 618; *Kirk v. Hamilton* (1890) 102 U. S. 68, 28 L. ed. 79; *100 Fed. 552.*

*Cheatham v. Edgessfield Mfg. Co.* (1904) 131 Fed. 118; *Berry v. Seawall* (1895) 66 Fed. 753, 13 C. C. A. 101; *City of Const. Co.* (1901) 107 Fed. 622.

<sup>80</sup> *Sowles v. First Nat. Bank* (1900)

<sup>81</sup> *Jewett Car Co. v. Kirkpatrick*

*Raising Question of Existence of Remedy at Law.*

**§ 85. Time for Raising This Objection.**

The objection that the plaintiff has an adequate remedy at law is one that should properly be put in at an early stage of the proceedings. It should be raised either by demurrer or plea. A defendant who submits an answer on the merits perhaps loses his technical right to raise the question,<sup>83</sup> though, of course, the court could, in its discretion, permit the answer to be withdrawn in order that the point might be raised by demurrer. The objection that the plaintiff has an adequate remedy at law will not be entertained when it is first made after the cause has been heard by a master.<sup>85</sup>

**§ 86. Objection First Made at Hearing.**

Where an objection to the maintenance of a suit in equity, on the ground that the plaintiff has an adequate remedy at law, is first made at the hearing, the court will construe the bill liberally in order to save its jurisdiction. But of course if the defect of jurisdiction is plain, the bill must be dismissed.<sup>84</sup> The tendency and disposition of the courts is to leave the question to be raised by the defendant, and if he does not make timely objection the court will not exert itself to raise the question for him, or to entertain it when he insists on it at a late stage in the proceedings.<sup>85</sup> A defendant who neglects until the hearing to make objection to the jurisdiction on the ground of the existence of a remedy at law may be taxed with costs, though the objection is sustained.<sup>86</sup>

**§ 87. When Objection Not Available on Appeal.**

The supreme court has declared that the defendant will not be permitted to make this point for the first time on appeal. The rule is stated to be, that if the court of equity has jurisdiction of the subject-matter, and the situation is such that that court is competent to grant the relief sought, then the court will not, on appeal, take notice of lack of jurisdiction by reason of there being an adequate remedy at law, the defendant having failed to make timely objection on this ground.<sup>87</sup> The court is not necessarily obliged to entertain the ob-

<sup>83</sup> 1 Dan. Ch. Pr., 4th Am. ed., 565. Fed. 322; United States v. Southern  
<sup>84</sup> Quirk v. Quirk (1907) 155 Fed. Pac. Co. (1902) 117 Fed. 544 (1904)  
199. 133 Fed. 651, 86 C. C. A. 581.  
<sup>85</sup> Zimmerman v. Carpenter (1898) 50 Marthinson v. King (C. C. A.;  
84 Fed. 747. 1906) 82 C. C. A. 360, 150 Fed. 48.  
<sup>86</sup> Williamson v. Monroe (1900) 101 87 Reynes v. Dumont (1889) 130 U.

jection when it is tardily raised, even though, if taken *in limine*, it might have been worthy of attention.<sup>88</sup>

But before this rule can apply, it must appear that the case is one over which a court of equity may, under some conditions, exercise jurisdiction. If the action is one over which equity cannot properly exercise jurisdiction at all, as an action to recover damages for slander or assault, or an action for the recovery of land by ejectment, the court will dismiss the suit at any stage.<sup>89</sup>

### § 88. Dismissal on Court's Own Motion.

What has been said must also be taken subject to the qualification that a court of equity, either original or appellate, may always refuse, of its own motion and at any stage of the proceedings, to entertain a suit in respect to matters cognizable at law.<sup>90</sup> The right of the court to dismiss a bill *sua sponte* is necessary for its protection; and if it did not have this power, the court would truly be at the mercy of the litigants. As the court can dismiss a suit of its own motion on the ground of the existence of an adequate remedy at law, it necessarily follows that it may do so when a demurrer is interposed on that ground, though the demurrer is informal.<sup>91</sup>

S. 395, 32 L. ed. 945; *Kilbourn v. Sunderland* (1889) 130 U. S. 514, 32 L. ed. 1008; *Detroit v. Detroit, etc. Ry. Co.* (1902) 184 U. S. 368, 46 L. ed. 592; *Green v. Turner* (1899) 98 Fed. 700.  
<sup>88</sup> *Southern Pac. R. Co. v. United States* (1906) 200 U. S. 349, 50 L. ed. 510; *Wylie v. Coxe* (1853) 15 How. 415, 14 L. ed. 753; *Insley v. United States* (1893) 150 U. S. 512, 37 L. ed. 1163; *Post v. Corbin* (1871) Fed. Cas. No. 11,299; *Baker v. Biddle* (1831) Fed. Cas. No. 764; *Pierpont v. Fowle* (1846) Fed. Cas. No. 11,152. On one occasion where an attempt was made to get the supreme court to entertain this objection when the question had not been raised in the court below, Mr. Justice Brewer said: "Defenses existing in equity suits may be waived, just as they may in law actions, and when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent

that defenses existed which, if presented, would have resulted in a decree of dismissal." *Hollins v. Brierfield Coal & Iron Co.* (1893) 150 U. S. 371, 390, 37 L. ed. 1113, 1115.

<sup>89</sup> *Detroit v. Detroit, etc. Ry. Co.* (1902) 184 U. S. 381, 46 L. ed. 603; *Indian Land & Trust Co. v. Shoenfelt* (1905) 68 C. C. A. 196, 135 Fed. 484.

<sup>90</sup> *Wylie v. Coxe* (1853) 15 How. 420, 14 L. ed. 755; *Hipp v. Babin* (1856) 19 How. 271, 278, 15 L. ed. 633, 635; *Thompson v. Railroad Companies* (1867) 6 Wall. 134, 18 L. ed. 765; *Lewis v. Cocks* (1874) 23 Wall. 466, 23 L. ed. 70; *Williams v. Nottawa Township* (1881) 104 U. S. 209, 28 L. ed. 719; *Turner v. Trust Co.* (1882) 106 U. S. 555, 27 L. ed. 274; *Farmington v. Pillsbury* (1886) 114 U. S. 144, 29 L. ed. 116; *Reynes v. Dumont* (1869) 130 U. S. 395, 32 L. ed. 945; *Strang v. Richmond, etc. R. Co.* (1900) 41 C. C. A. 474, 101 Fed. 511; *Indian Land & Trust Co. v. Shoenfelt* (1905) 68 C. C. A. 196, 135 Fed. 484.

<sup>91</sup> *McGuire v. Peñascola City Co.* (1901) 44 C. C. A. 670, 105 Fed. 677.

### § 89. Practice upon Misjoinder of Legal and Equitable Causes.

If a bill states a cause of action cognizable in equity, and other distinct causes of action for which the plaintiff has an adequate remedy at law, a motion to dismiss the bill, or a demurrer thereto, based on the ground that the plaintiff has an adequate remedy at law, will not be sustained.<sup>92</sup> The plaintiff should demur specially to so much of the bill as is objectionable. Where a bill contains matters of both legal and equitable nature, the court may order the complaint to be recast into two cases, one at law and the other in equity. But this will be done only where the two causes of action are so distinct that there is a plain, adequate, and complete remedy at law in respect to the legal claim, and where there is no good reason for equity to undertake to determine the whole controversy in one suit.<sup>93</sup>

### § 90. Transfer of Cause from Law to Equity.

When a cause is removed from the court of a state where the distinction between legal and equitable remedies has been abolished, and the case on reaching the federal court is docketed on the law side, but it is afterwards found to be a cause of equitable cognizance, the plaintiff should ask to have the cause transferred to the equity docket, with leave to plead if necessary.<sup>94</sup>

### § 91. Effect of Adjudicating upon Propriety of Forum.

If, in an action at law, the court reaches the conclusion that the plaintiff's remedy is in equity and for that reason enters judgment in favor of the defendant (but without prejudice), and the plaintiff then sues in equity, the court will not, in the equity suit, entertain a demurrer based on the idea that the plaintiff's remedy is at law, that point having been considered in the previous suit. Although not strictly *res judicata*, the matter involves a point of equity and judicial fairness. The court will not be a party to the travesty on justice that might ensue, if a party could be dismissed from the law aside on the ground that his remedy is to be sought in equity, and then from the equity side on the ground that his remedy is at law.<sup>95</sup> A decree of the supreme court dismissing a bill on the ground that

<sup>92</sup> *Haight & Freese Co. v. Weiss* (C. Soc. (1896) 21 C. C. A. 206, 75 Fed. 43; C. A.; 1907) 156 Fed. 328. *Reagan v. Aiken* (1891) 138 U. S. 109.

<sup>93</sup> *Chapman v. Yellow Poplar etc. Co.* 34 L. ed. 892.

(1906) 74 C. C. A. 331, 143 Fed. 206. <sup>95</sup> *Aetna Life Ins. Co. v. Lyon Co.*

<sup>94</sup> *Blalock v. Equitable Life Assur.* (1897) 62 Fed. 936.

the plaintiff's remedy is at law is binding on the court of law when an action is afterwards brought in that forum.<sup>96</sup>

**§ 92. Estoppel of Plaintiff to Question Jurisdiction.**

A plaintiff who has himself invoked the aid of the court of equity to recover on a legal claim will not be permitted on appeal to raise the objection of adequate remedy at law when the fortune of litigation appears to be with his opponent. His election to proceed in equity operates as a waiver of his right to object to the jurisdiction, or at least this is so where the court is competent to entertain the suit at all.<sup>97</sup>

<sup>96</sup> *Central Ohio R. R. v. Thompson* 164, 41 L. ed. 116; *Green v. Turner* (1899) 2 Bond, 296, Fed. Cas. No. 2,550. (1899) 96 Fed. 760.

<sup>97</sup> *Perego v. Dodge* (1896) 163 U. S.

## CHAPTER III

### JURISPRUDENCE AND PRACTICE OF FEDERAL COURTS OF EQUITY.

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- § 93. Source of Jurisprudence of Federal Courts of Equity.
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#### *The Practice in General.*

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*General Jurisprudence.***§ 93. Source of Jurisprudence of Federal Courts of Equity.**

In the preceding sections we have had under consideration the jurisdiction of the federal court as a court of equity. The subject next to be dealt with is the jurisprudence of the court of equity. From what sources does the federal court, sitting as a court of equity, draw the rules by which it is guided in determining suits? The law on this point is apparently in a condition somewhat similar to that which was found to exist in regard to matters of jurisdiction; and, in fact, jurisdiction and jurisprudence are apparently only two different manifestations of one idea. Primarily, the jurisprudence of the federal courts of equity is the jurisprudence of the English High Court of Chancery. The rules, doctrines, and principles of equity as defined and developed in that court may be said to be our common law of equity.<sup>1</sup>

**§ 94. Federal Equity Distinct General Jurisprudence.**

The federal courts of equity are therefore the expounders of a distinct general jurisprudence based on and derived from the equity jurisprudence of the English High Court of Chancery, though not necessarily limited by that jurisprudence. We say that the equitable rules and doctrines applied in the federal courts comprise a distinct jurisprudence, for the reason that any body of rules, when adopted,

<sup>1</sup> *State of Pennsylvania v. Wheeling & Ballou* (1885) 114 U. S. 190, 5 Sup. Ct. & B. Bridge Co. (1861) 13 How. 518, 280, 29 L. ed. 132; *Alger v. Anderson* 503, 14 L. ed. 240, 268; *Litchfield v.* (1899) 92 Fed. 696, 699.



expounded, and applied in courts of an independent jurisdiction, must in the end become a distinct system of rules. If a number of different jurisdictions are established, each with its own independent courts, it will always be found that each of these will develop features that mark its jurisprudence as distinct, though they all derive their principles from a common source. The phenomenon is abundantly illustrated in the growth and development of the laws of our several states in the departments of both law and equity. The federal courts of equity, though professing to enforce the general jurisprudence of the English court of chancery, have nevertheless built up a distinct system of equitable doctrines, suited to the needs of the community and civilization over which they exercise judicial authority.

#### § 95. Unaffected by State Decisions.

It follows that the federal courts of equity are not bound by the general rules of equity jurisprudence that may grow up or be established in the different states of the Union. So far as the federal courts are concerned, the same rules of decision in equity theoretically prevail in each state. On questions of general equity jurisprudence the federal courts are not bound by the laws of the state in which they sit or by the decisions of the state court construing those laws.

*James v. Gray* (C. C. A.; 1904) 1 L.R.A.(N.S.) 321, 65 C. C. A. 385, 131 Fed. 401: A married woman, living with her husband in Massachusetts, made a loan of a considerable sum of money to a firm there doing business. Her husband was one of the partners in this firm. In the present bankrupt proceedings in a federal court of equity, the married woman sought to prove this debt against the firm and to have it allowed as a valid claim. Upon common-law principles the claim could not be allowed, because at common law no contract can exist between the wife and the partnership of which her husband is a member. Furthermore, by a statute of the state of Massachusetts, it is declared that a married woman is not authorized to make a contract with her husband. However, by the law of the same state, it is also provided that the real and personal property of a married woman shall constitute a separate estate, and that she shall have the power to control and dispose of it to the same extent as if she were a feme sole. The question therefore arose whether the claim of the married woman could be allowed in the federal court of bankruptcy on the equitable principles applicable to statutory separate estates or separate estates analogous to statutory estates. Now, upon the general principles of equity jurisprudence, as derived from the jurisprudence of the English chancery and as adopted and affirmed in the federal courts of equity, there could be no question, so the court considered, as to the propriety of granting the desired relief. The property of the married woman had been made into separate estate by statute, and a right was thus created which it was the duty of the federal court of equity to protect by its peculiar equitable remedies. In these courts, the statutory separate estate

of a married woman is regarded, for all substantial purposes, as an equitable separate estate, and it is protected to the same extent and in the same manner. The chief doubt or obstacle in this case resulted from the circumstance that the supreme court of Massachusetts had held that a wife cannot have relief in equity against her husband, or his firm, for a loan of money made to him, or to the firm, even though the money is such as by the statute of that state constitutes a part of her statutory separate estate.<sup>1</sup> This ruling of the Massachusetts court, it may be noted, constitutes a judicial determination by that court of the meaning of its own statutes; but nevertheless the ruling is eccentric and is not in harmony with the doctrines of equity as enforced in the federal courts and in other jurisdictions whose equitable doctrines are derived from the same source, to wit, from the jurisprudence of the English chancery. Accordingly, the federal court had to determine in the principal case whether it would follow the decisions of the Massachusetts court as to the meaning of its own statute or whether it would follow the general and accepted doctrine of equity jurisprudence. It was held that the court might properly reject the rule adopted by the state court and follow the general doctrine of equity courts. Relief was therefore granted. In passing on this question, the court, through Putnam, Circuit Judge, said: "While the federal courts are required by the statutes creating them to accept, as rules of decision in trials at common law, the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise provide, their proceedings in equity suits, involving equitable rights, cannot be impaired by the local rules of the different states in which they sit. The principles of equity as applied by them are the same everywhere in the United States. Of course, there may necessarily exist exceptional circumstances; as, for example, in Louisiana, where there never has been any law of uses and trusts as in England, so there can be no such thing as an estate limited to the separate use of the wife. There the whole topic of the rights and obligations of the wife is a part of the code or statutory law of the state. So, also, if any state, say Massachusetts, had peculiar legislation relating to estates vested to the separate use of the wife, that legislation might have to be regarded by the federal courts in equity as well as at law. Such exceptional cases ordinarily fall within those chancery rules which relate to giving special remedies for rights existing only at common law or under a statute."<sup>2</sup>

### § 96. Same Doctrine Further Expounded.

The doctrine just stated must be taken to apply only in those situations where the principle or rule that the court is called on to enforce is a rule of general equity jurisprudence and where also the state statute is not absolutely and clearly applicable. If a state statute

<sup>1</sup> *Woodward v. Spurr* (1886) 141 Mass. 283, 286; *Clark v. Patterson* (1893) 156 Mass. 388, 391.

<sup>2</sup> There was a vigorous dissent by one of the three judges who heard this case. Notwithstanding the difficulties in which the subject is involved, and notwithstanding the fact that some authorities tending to the contrary con-

clusion can be cited, we believe that the majority opinion was right. The rule announced in this case has been followed in a later decision of the same court. *Tucker v. Curtin* (C. C. A.; 1906) 78 C. C. A. 557, 148 Fed. 929. See *Moore v. Green* (C. C. A.; 1906) 76 C. C. A. 242, 145 Fed. 478.

creates, defines, or limits individual rights the federal court of equity will be governed by the statute in enforcing those rights. Just as we learned, in a former section, that the jurisdiction of the federal court of equity, though apparently independent of state law, is nevertheless subject to be indirectly controlled and extended by state laws, so here the rule is that the rules and doctrines of equity jurisprudence enforceable in a federal court are subject to be limited or extended in particular localities by the existence of laws affecting individual rights. In considering the nature of the jurisdiction and laws enforced in the federal courts, it must not be forgotten that these courts are courts of the particular states wherein they sit, as well as courts of the United States; and in administering the equitable remedies, they are bound to take account of rights lawfully created and existing under state statutes. The decision in *James v. Gray*, *ante*, seems to go against this principle, and its doctrine is to that extent open to careful inquiry. The real import of that decision seems to be found, however, in the following consideration: The question here was not so much whether the federal court would be bound by a state statute defining the equitable rights of a married woman as it was whether the federal court of equity would hold itself conclusively bound by the interpretation put on the state law by the highest court of the state. Here was an instance where the state court had adopted an interpretation that seemed to be capricious and incorrect. The federal court accordingly refused to be bound by that interpretation. If the federal court, upon considering the state statute, had itself been of the opinion that this statute did necessarily destroy the right of a married woman to assert an equity to her statutory estate as against the husband's firm, it would have refused to grant relief. Indeed, the language above quoted from the opinion of Judge Putnam shows that the law was so understood by the court in that case. Federal courts of equity are bound by the statutes of the state so far as they create and define rights; and ordinarily the federal courts will follow the judicial interpretation of those statutes made by the highest state court. But in adopting the judicial interpretation of a state statute made by a state court, the federal courts are actuated by a spirit and principle of comity; and they may rightly refuse to adopt an interpretation made by the state court that seems to them really to be arbitrary, capricious, and unreasonable. That, it seems to us, is the meaning of this case, though the considerations controlling the court were not expressed in exactly this way.

*The Practice in General.***§ 97. Equity Practice in Federal Courts.**

The practice of the federal courts of equity, like their jurisdiction and jurisprudence, is a distinctive practice based on and derived from the practice of the English High Court of Chancery. Proceedings in equity must be primarily according to the forms and usages belonging to the court of equity as it formerly existed in England. But while it is true that the pleading and practice in federal courts of equity are based on the English system, it must not be imagined that the two are the same. The very structure and organization of the federal courts of itself has led to very many modifications of the parent system; and, especially, the circumstance that the jurisdiction of the federal courts is a limited one has given rise to a number of new problems in regard to procedure and has made certain departures necessary. Legislation has almost uniformly tended to make equity proceedings in the federal courts more simple, direct, and effective; and the courts themselves by their own rules and practice have constantly striven to bring about the same result. Moreover it must be considered that the federal courts have now been established for considerably more than a hundred years. The amount of litigation that has come before them in this period is enormous, and very much of it has been conducted on the equity side. A great many questions on matters of equity pleading and practice have thus been considered and determined by these courts. The decisions in which such points have been settled necessarily furnish the precedents by which similar problems presented to these courts in the future are to be solved. The analogies from which the federal judges reason are to be found primarily in the decisions of the federal courts. There is a practical limit to the possible range of the judicial mind, and in the multiplication of judicial authorities the courts are bound more and more to confine their attention, especially in matters of pleading and practice, to those decisions that are of actual authority in the particular jurisdiction or, at least, that have been pronounced by courts organized, as are the federal courts, upon the same general plan. This tends inevitably to a steady and constant differentiation. Indeed, it may be said, no system of courts exercising an independent and final jurisdiction, such as the federal courts exercise, can be created and set going without this result ensuing. The independent exercise of judicial power necessarily leads in each case to the establishment of a distinctive system of procedure. The equity pleading and practice

of the federal courts are distinct from the English chancery procedure because the federal courts are independent of the English courts and are not conclusively bound by the decisions of those courts. The English system is merely to be looked to as furnishing analogies where our own system is found to be wanting.<sup>4</sup>

### § 98. Unaffected by State Practice.

As the federal courts of equity have their own distinctive practice, uniform alike throughout all the states, this practice is untouched and unaffected by the equity practice of the state courts of equity, whether based on local statutes or on the decisions of the state courts.<sup>5</sup> A state statute permitting a married woman to sue in her own name, instead of by her next friend, is of no effect to control the federal equity practice on this point.<sup>6</sup> The fact that a state statute has abolished the distinction between legal and equitable actions does not in any way affect the federal practice or the jurisdiction of the respective federal courts of law and equity.<sup>7</sup>

### § 99. Power of Federal Court of Equity to Adopt State Practice.

Though the equity practice of the federal courts is not controlled by state statutes or by the practice of the state courts, the federal courts will sometimes, in the exercise of their discretion, follow the usages and practice of the state courts of equity. This is rendered possible by the fact that, in the absence of a provision of a law of the United States or of a rule prescribed by the supreme court, the several courts of equity may regulate their own practice.<sup>8</sup>

<sup>4</sup> Equity Rule 90.

<sup>7</sup> *Bennett v. Butterworth* (1850) 11

<sup>5</sup> *Noonan v. Braley* (1862) 2 Black 499, 17 L. ed. 278; *Robinson v. Campbell* (1818) 3 Wheat. 212, 4 L. ed. 372; *Boyle v. Zacharie* (1832) 6 Pet. 648, 8 L. ed. 532; *Gaines v. Relf* (1841) 15 Pet. 9, 10 L. ed. 642; *Gaines v. Chew* (1844) 2 How. 619, 11 L. ed. 402; *Bein v. Heath* (1861) 12 How. 168, 13 L. ed. 939; *Neves v. Scott* (1851) 13 How. 270, 14 L. ed. 141; *Fenn v. Holme* (1858) 21 How. 481, 16 L. ed. 188; *Green v. Creighton* (1859) 23 How. 16, 16 L. ed. 419; *Payne v. Hook* (1868) 7 Wall. 425, 19 L. ed. 280; *U. S. v. Wilson* (1896) 118 U. S. 86, 30 L. ed. 110; *Bronson v. Schulten* (1881) 104 U. S. 410, 26 L. ed. 797.

*How. 669, 13 L. ed. 859; Thompson v. Central Ohio R. Co.* (1867) 6 Wall. 134, 18 L. ed. 765; *Hollins v. Brierfield Coal etc. Co.* (1893) 150 U. S. 379, 37 L. ed. 1115; *Hurt v. Hollingsworth* (1879) 100 U. S. 100, 25 L. ed. 569; *Nations v. Johnson* (1860) 24 How. 197, 18 L. ed. 629; *Mississippi Mills v. Cohn* (1893) 150 U. S. 204, 37 L. ed. 1053; *Scott v. Neely* (1891) 140 U. S. 110, 35 L. ed. 380; *Lindsay v. Bank* (1895) 156 U. S. 485, 39 L. ed. 505; *Davis v. Davis* (1896) 18 C. C. A. 438, 72 Fed. 81.

<sup>8</sup> *Bills v. Railroad Co.* (1876) 13 Blatchf. 230; *Cutter Co. v. Sears* (1881) 9 Fed. 8; *Cutter Co. v. Jones* (1882) 13 Fed. 567; *Deprez v. Thomson-Houston Co.* (1894) 66 Fed. 22.

<sup>6</sup> *Wills v. Pauly* (1892) 51 Fed. 257.

**§ 100. State Statute Defining Equitable Rights of Parties.**

While the practice of the equity courts is not subject to control by the laws of the states, this principle is not to be carried so far as to deny to a party in federal courts of equity any substantial right conferred by state law, or to add to or take from a contract that which is made a part of it by the law of any state. This doctrine is analogous to that which requires the federal courts to enforce new rights conferred by state statutes, but it is not exactly the same.

*Brine v. Insurance Co.* (1877) 96 U. S. 627, 24 L. ed. 858: Among the principles of equity practice derived from the high court of chancery in England and in vogue in the federal courts, is the rule that in proceedings for the foreclosure of mortgages of land, the sale conducted by the master cuts off the right of redemption. By a statute of Illinois it is provided that, in mortgage foreclosures, the debtor shall have a full year after the sale within which to redeem, and any judgment creditor of the debtor an additional three months within which to redeem. In a foreclosure suit arising in that state, the circuit court entered a decree cutting off the equity of redemption in conformity with its usual practice and in conformity with the rule of equity generally prevailing. It was held that this was erroneous. Said Mr. Justice Miller: "When substantial rights, resting upon a statute which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the latter must give way, and adapt themselves to the forms necessary to give effect to such rights. The flexibility of chancery methods, by which it moulds its decrees so as to give appropriate relief in all cases within its jurisdiction, enables it to do this without violence to principle. If one or the other must give way, good sense unhesitatingly requires that justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrificed to mere questions of mode and form."

**§ 101. How Far Federal Court Must Follow State Statute.**

In giving effect to a right thus secured by state statute, it is not necessary that the practice in the federal court of equity should precisely follow the state statute. As to the form and mode of securing the right, that is a matter largely within the discretion of the court. It is enough if the right is substantially preserved. This may be done by any such suitable mode of proceeding as the flexibility of chancery proceedings will enable the court to adopt.

1. *Connecticut Mut. Ins. Co. v. Oushman* (1882) 106 U. S. 51, 27 L. ed. 648: The state statute, securing the right of redemption to the mortgage debtor for a period of one year after foreclosure sale, provided that, in order to effect redemption, the debtor should pay the requisite sum of money to the officer having the execution; while the rule adopted by the federal court required that the money should be paid to the holder of the certificate or to the clerk of the court. It

was held that this rule was valid. Said Mr. Justice Harlan: "The substantial right given by the statute to the purchaser is that the redemption money be secured to him before the benefit of his purchase is taken away, and the substantial right given to the party redeeming is that the redemption become complete and effectual upon payment by him of the required amount. The particular mode in which the money is paid or secured by the latter for the benefit of the former is not of the substance of the rights of either. The mode or manner of payment belongs, so far as the federal court is concerned, to the domain of practice, the power to regulate which, in harmony with the laws of the United States and the rules of this court, as might be necessary and convenient for the administration of justice, is expressly given by statute to the circuit courts."

2. *Alfie v. Insurance Co.* (1877) 97 U. S. 144, 24 L. ed. 1008: In this case it appeared that a statute of Minnesota gave a right of redemption similar to that conferred by the Illinois statute. The foreclosure decree in the federal court directed that, at the sale, the master should deliver a certificate to the purchaser and that, if the land were not redeemed in a year, he should then execute a deed, and the sale would be confirmed giving possession to the purchaser. It was held that this was not bad practice, as the effect of the decree was to preserve the right of redemption unimpaired. The fact that the state practice was somewhat different was held to be immaterial.\*

#### § 109. When Statutory Provisions Relevant on Sufficiency of Pleadings.

Though the forms and modes of equity pleading in the federal courts are not subject to be controlled by state legislation, it has nevertheless been held that for the purpose of determining the sufficiency of the allegations of a bill in equity, the statutes of a state may sometimes be considered persuasive, especially where the cause of action is derived from a federal statute that has been supplemented by local state enactments. Thus it has been determined that in a bill in equity, preferred under section 2326 of the Revised Statutes, and amendatory enactments, to prevent a land patent from being issued to the defendants on the ground that their application covers mining land to which the plaintiff is entitled and of which he is in possession, it is sufficient for the bill simply to allege, in conformity with the state procedure, that the plaintiff is the owner and in possession of the property, describing it, and that the defendants are unlawfully asserting a claim thereto. Under strict rules of equity pleading, such a

\* *Langdon v. Sherwood* (1888) 124 U. S. 74, 31 L. ed. 344; *Bendey v. Townsend* (1884) 109 U. S. 668, 27 L. ed. 1065; *Barnitz v. Beverly* (1896) 163 U. S. 127, 41 L. ed. 99; *De Vaughn v. Hutchinson* (1897) 165 U. S. 570, 41 L. ed. 829; *Flagg v. Walker* (1885) 113 U. S. 659, 28 L. ed. 1072; *Deck v. Whitman* (1899) 96 Fed. 873, contains a very full discussion of the cases bearing on the federal practice in foreclosure cases. See also note to *Seattle etc. Ry. Co. v. Union Trust Co.* (1897) 24 C. C. A. 512, 523. In *Benedict v. Railroad Co.* (1888) 19 Fed. 173, a state statute was given effect in regard to foreclosure decrees where the mortgage waives appraisalment. See also *Dow v. Railroad Co.* (1884) 20 Fed. 260.

general statement would be insufficient, and the plaintiff would be required to show the steps he had taken in acquiring his possession and title, and to point out the defects existing in the defendant's claim. The reason for this relaxation of the rule of equity pleading is found in the purely statutory nature of the proceeding in question. Upon this point, it is to be borne in mind that such a suit is but a sort of continuation of a land office proceeding. It has its inception in the land office, not in the court where the suit is commenced. The first step begins with the assertion of the defendant's claim to have a patent issued to him for the land in controversy. The next step is the filing of the adverse claim by the plaintiff in the land office. The suit in equity to prevent the issuance of the patent has been said by the supreme court to be but a continuation of the land office proceedings. Hence it seems eminently proper that on the question of the sufficiency of the pleadings, even in equity, the statutory provisions should be kept in view.<sup>10</sup>

### *Mode of Conducting Litigation in Equity.*

#### § 103. How Causes Must Be Litigated in Equity.

An equity cause cannot be litigated according to common-law modes of procedure; nor can it be conducted according to any system of civil procedure in which the distinction between legal and equitable remedies is disregarded. Where a suit involving matter of purely equitable cognizance is conducted on the law side according to the forms and practice of legal proceedings, the judgment entered therein will be reversed, though the proceedings conform to the state practice.<sup>11</sup>

<sup>10</sup> *Tomopah etc. Co. v. Douglas* on. It appears that the district court (1903) 123 Fed. 936; *Union Mill etc. Co. v. Warren* (1897) 62 Fed. 519. *Compare Wolverton v. Nichols* (1886) 119 U. S. 485, 30 L. ed. 474; *Ely v. New Mexico etc. Co.* (1889) 129 U. S. 291, 32 L. ed. 688; *Parley's Park etc. Co. v. Kerr* (1889) 130 U. S. 256, 32 L. ed. 906; *420 Mining Co. v. Bullion Co.* (1876) 3 Sawy. 634, Fed. Cas. No. 4,989.

<sup>11</sup> *Controversy over Practice of Federal Courts in Louisiana.*—In the first half of the nineteenth century the question whether the circuit court in Louisiana had equity powers and whether those powers should be exercised in conformity with the equity practice elsewhere prevailing in federal courts of equity was frequently passed on. It appears that the district court of Louisiana adopted a rule abolishing chancery practice so far as that court was concerned. This was reprobated by the supreme court in *Story v. Livingston* (1839) 13 Pet. 368, 10 L. ed. 204. In *Ex p. Myra Clark Whitney* (1839) 13 Pet. 404, 10 L. ed. 221, an application was made to the supreme court for a writ of mandamus to compel the district judge to proceed in a particular case according to the course of chancery practice. The supreme court held that mandamus was not the proper remedy, but it emphasized its position that the federal court in Louisiana was bound to conform to the forms and modes of proceeding in equity as elsewhere established. Again, in *Gaines v. Relf* (1841) 15 Pet. 9, 10 L. ed. 642, the



1. *Dunphy v. Kleinmuth* (1871) 11 Wall. 610, 20 L. ed. 223: The bill stated an equitable cause of action in the nature of a creditors' suit, the purpose of the litigation being to reach and subject property fraudulently conveyed and also to hold the defendants personally liable. The case was erroneously tried according to the forms of common-law procedure. The verdict of a jury was taken, and a judgment was entered on the verdict. On appeal the case was reversed on two grounds: (1) The case, being a chancery cause, should have been tried according to the modes of proceeding known to the courts of equity; and (2) the judgment was not such as might properly have been entered if the case had been tried by the court sitting in chancery. It was said: "In those courts [courts of equity] the judge or chancellor is responsible for the decree. If he refers any questions of fact to a jury, as he may do by a feigned issue, he is still to be satisfied in his own conscience that the finding is correct, and the decree must be made as the result of his own judgment, aided, it is true, by the finding of the jury. Here the judgment is pronounced as the mere conclusion of law upon the facts found by the jury."<sup>12</sup>

2. *Lindsay v. Shreveport Bank* (1894) 156 U. S. 485, 39 L. ed. 505: A national bank brought an action to cancel or modify an assessment of taxes made by the state authorities on the shares of its capital stock. The relief prayed for was in the nature of a decree enjoining the collection of the taxes. The verdict consisted of a finding that the assessment complained of should be reduced. The judgment modified the assessment and enjoined the officers from collecting the taxes as imposed. The proceedings were in conformity with the practice in vogue in Louisiana. The judgment was reversed because, though the cause was of equitable cognizance, it had been conducted as a legal action. Said Mr. Justice Shiras: "So long as we attach importance to regular forms of procedure, we cannot sustain so plain an attempt as is here presented to substitute the machinery of a court of law, in which the facts are found by the jury and the law prescribed by the judge, for the usual and legitimate practice of a court of chancery. How inadequate and incongruous the legal remedy is in a case like the present is shown by the so-called judgment. It does not adjudge a sum of money as due by the defendants to the plaintiff whose payment could be enforced by appropriate writs of execution, but it awards a judgment in favor of the plaintiff and against the defendants by decreeing a reduction or abatement of the legal assessments, there existing no legal writ by which the defendants can be compelled to respect or obey the decree."

#### § 104. Necessity for Bill and Answer.

The bill and answer (or a bill taken *pro confesso*) supply the necessary foundation of every suit in equity; and unless these contain a statement of facts upon which a decree can be entered and, if necessary, revised by the appellate court, the proceeding cannot be said to

supreme court observed that while it might; and it accordingly did so in that did not have the power by mandamus case. to force the district court to conform.<sup>13</sup> The principal case was questioned its practice in equity cases to the general and overruled, but on another point, oral equity practice, yet it had the power in *Hornbuckle v. Toombs* (1873) 18 or on appeal to reverse those proceedings. Wall. 648, 21 L. ed. 966.

be a proceeding in equity.<sup>13</sup> Equity will not assume to decide a cause without pleadings; and a stipulation contained in an agreed statement of facts, signed by counsel for both parties, to the effect that the cause shall be heard in equity on that statement of facts without pleadings, is of no effect. The practice of the court of equity is regulated by law and cannot be varied by the agreement of the parties. Nor can a state statute make such an agreement effective.<sup>14</sup>

### § 105. Practice in Federal Territorial Courts—Organic Act.

In regard to the practice and forms of pleading to be observed in the territorial courts under the laws of the territorial legislatures, it should be noted that at first the supreme court declared that the distinction between law and equity should be strictly preserved there as in federal courts elsewhere.<sup>15</sup> But the cases in which this doctrine had been declared were afterwards overruled, and the true rule was declared to be this, namely, "that the practice, pleadings, and forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions, subject to a few express or implied conditions in the organic act itself, were intended to be left to the legislative action of the territorial assemblies, and to the regulations which might be adopted by the courts themselves."<sup>16</sup> Evidently the matter is one to be determined under the organic act under which the territorial courts are established. When the organic act simply declares that the territorial courts shall possess both jurisdictions without prescribing how they shall be exercised, the passage by the territorial assembly of a code of practice that unites both in one form of action cannot be deemed repugnant to such organic act. In other words, the powers exercised by the territorial legislature are in a sense as extensive as those exercised by the state legislatures subject only to the plenary control of Congress.

### § 106. Proceedings at Law and in Equity in Territorial Courts.

And yet, notwithstanding a territorial assembly may have abolished the distinction between legal and equitable remedies, it does not follow that the distinction between law and equity has been totally

<sup>13</sup> *Bennett v. Butterworth* (1850) 11 How. 689, 13 L. ed. 859. <sup>14</sup> *Hornbuckle v. Toombs* (1873) 18 Wall. 648, 21 L. ed. 966; *Hershfield v.*

<sup>15</sup> *Nickerson v. Atchison, T. & S. F. Ry. Co.* (1890) 30 Fed. 85. <sup>16</sup> *Griffith* (1873) id. 657, 21 L. ed. 968; *Davis v. Billaland* (1873) id. 659, 21 L.

<sup>17</sup> *Noonan v. Lee* (1862) 2 Black, 499, ed. 969; *Ely v. New Mexico etc. R. Co.* 17 L. ed. 278; *Orchard v. Hughes* (1863) (1889) 129 U. S. 293, 32 L. ed. 689; 1 Wall. 77, 17 L. ed. 561; *Dunphy v. Bent v. Thompson* (1891) 133 U. S. 123, *Kleinamith* (1871) 11 Wall. 610, 20 L. ed. 905. ed. 223.

eradicated; and in determining whether either of the parties shall be allowed a jury trial the nature of the cause must be determined as being at law or in equity according to the ordinary criteria.

*Bassett v. Gallagher* (1874) 20 Wall. 670, 22 L. ed. 452: The organic act recognized the distinction between law and equity and required both sorts of relief to be administered in one court. The territorial statute, regulating procedure, allowed only one form of civil action whether the cause was legal or equitable; but it also provided that issues of fact should be tried by a jury. It was held that when a case came up for hearing, or trial, it was the duty of the court to consider the pleadings and determine whether the case was of a legal or equitable nature. If the remedy sought was a legal one, then the cause should be tried by a jury unless a jury was waived; if equitable relief was sought, then the court was not bound to call a jury; and if a jury were called, its verdict would be advisory only, as upon any issue submitted in equity to a jury. In the legal action, the judgment should follow the verdict; in the equitable proceeding, the decree should proceed from the conscience and judgment of the court.

### *Statutes and Rules of Court.*

#### § 107. Statutes Regarding Practice of Federal Courts of Equity.

The ultimate power of regulating the practice of the federal courts in all of its branches resides in Congress; and so far as this body sees fit to enact laws in regard to the procedure to be followed in the federal courts, these laws are, of course, binding. But by a sort of comity between the legislative and judicial branches, it has always been recognized as proper that matters of practice should, to a great extent, be controlled by the courts themselves. Accordingly we find that Congress has not attempted to promulgate any elaborate code of equity procedure for the courts created by it, but has, as we shall now see, delegated this subject to the supreme court and to the inferior courts. The only general condition imposed by Congress is that the forms and modes of proceeding in equity causes shall be according to the principles, rules, and usages belonging to courts of equity, subject, however, to regulation by the courts.<sup>17</sup>

#### § 108. Supreme Court to Regulate Practice of Equity Courts.

The supreme court of the United States, as a court of original jurisdiction, has inherent power to regulate its own practice so far

<sup>17</sup> "The forms of mesne process and principles, rules, and usages which belong to courts of equity and of admiralty and of maritime jurisdiction in the circuit and otherwise provided by statute or by district courts shall be according to the rules of court made in pursuance there-

as the same is not regulated by any law of the United States binding on the supreme court. As a court of appellate jurisdiction, it also has a similar power to regulate its own practice in appeals and writs of error. Incidentally, it has the further power, as an appellate court, to regulate the practice of the inferior courts. This it naturally does by declaring from time to time, as occasion may require, what practice in the inferior courts is good practice and what practice is bad. But aside from the inherent and incidental power of regulating practice which has just been mentioned, the supreme court has been specially endowed by statute with a sort of legislative authority over the practice of all the federal courts.

### § 109. Codes of Rules Promulgated by Supreme Court.

By an early statute the supreme court was given power to make rules for the regulation of equity practice in the circuit and district courts;<sup>18</sup> and in pursuance of this statute the supreme court promulgated the code of procedure comprised in the series of rules of 1822.<sup>19</sup> These rules were superseded by the present Equity Rules, which were put into effect by the supreme court on March 2, 1842. This latter series of rules, with amendments, comprises the body of rules now in force. An additional statute passed by Congress in the same year fully recognizes the authority of the supreme court to regulate the whole practice of the circuit and district courts in suits in equity, provided the regulations and practice so prescribed by the supreme court are consistent with the laws of the United States.<sup>20</sup>

### § 110. Extent of Power to Make Rules.

The supreme court, in the exercise of its statutory power to make binding rules of practice, has no power to modify an act of Con-

of; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the supreme court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States." Rev. Stat. sec. 913.

<sup>18</sup> Act of May 8, 1792, ch. 36, sec. 2. *Wayman v. Southard* (1825) 10 Wheat. 1, 27, 29, 6 L. ed. 253, 259; *Bank of U. S. v. Halstead* (1825) 10 Wheat. 51, 6 L. ed. 264; *Beers v. Haughton* (1835) 9 Pet. 329, 360, 9 L. ed. 145, 157; *Ward v. Chamberlain* (1862) 2 Black, 430, 436, 17 L. ed. 319, 323.

<sup>19</sup> 7 Wheat. v-vii.

<sup>20</sup> Act of Aug. 23, 1842, ch. 188, § 5 Stat. L. 518. This statute is brought into the Revised Statutes as sec. 917, which reads as follows: "The supreme court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court,

gress,<sup>21</sup> or materially to change the effect of the lawful processes of the court on property rights.

*Ward v. Chamberlain* (1862) 2 Black, 436, 17 L. ed. 323: Though the supreme court under this statute has power to regulate the forms of writs and other process, it has no power to adopt a rule making a judgment or decree for the payment of money a lien on land where no such charge is created by law, or to displace any such right where the same is conferred or recognized by statute. "It cannot for a moment be admitted that any rule adopted by this court, merely as such, can enlarge, diminish, or vary the operation and effect of means or final process upon the property of the debtor."

### § 111. Effect of Rules on Jurisdiction of Courts.

The rules of practice adopted by the supreme court have no relation to jurisdiction and cannot operate to increase or diminish the jurisdiction of the federal courts as by law determined.<sup>22</sup>

### § 112. Courts of District of Columbia.

The equity rules promulgated by the supreme court do not apply to equity suits originating in the courts of the District of Columbia.<sup>23</sup>

### § 113. Discretion of Lower Courts in Enforcing Rules.

While the circuit and district courts cannot abrogate or nullify the rules of practice promulgated by the supreme court, they may temper the operation of those rules in proper case by the exercise of judicial discretion.<sup>24</sup>

### § 114. Power of Circuit and District Courts to Make Rules.

In addition to the rules promulgated by the supreme court for the guidance of the circuit and district courts, these courts have a power

and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the circuit and district courts." It will be seen that the authority to regulate here given is expressly limited to proceedings in equity and admiralty, the expression "in suits at common law, or in admiralty and in equity" as used in the original statute being changed to "in suits in equity or admiralty."

As to the power conferred by this statute of making rules in admiralty, see the following cases: *The Kentucky* (1860) 4 Blatchf. 448; *The Selt* (1872) 3 Biss. 344; *Russel v. The Asa R. Swift* (1867) Newberry, Adm. 553; *Scott v. The Young America* (1856) Newberry, Adm. 107; *The Illinois* (1857) Brown, Adm. 13; *Bailey v. Sundberg* (1892) 1 C. C. A. 367, 49 Fed. 583; *The Bremena v. Card* (1889) 38 Fed. 144; *Bolden v. Jensen* (1895) 69 Fed. 745; *Marshall v. Bazin* (1849) Fed. Cas. No. 9,125.

<sup>21</sup> *The Kentucky* (1860) 4 Blatchf. 448, Fed. Cas. No. 7,717.

<sup>22</sup> *New England Ins. Co. v. Detroit etc. Co.* (1871) Fed. Cas. No. 10,154; *In re Kirkland* (1873) Fed. Cas. No. 7,842.

<sup>23</sup> *Westervelt v. Library Bureau* (C. C. A.; 1902) 55 C. C. A. 436, 118 Fed. 824.

<sup>24</sup> *Bank v. White* (1834) 8 Pet. 269,

to adopt rules of practice of their own. This power is expressly sanctioned and its limits defined in a general statute applicable alike to proceedings both at law and in equity.<sup>25</sup> The power of the circuit courts to promulgate rules for their own guidance in equity causes is also recognized in the equity rules.

**Equity Rule 89:** The circuit courts (a majority of all the judges thereof, including the justice of the supreme court, the circuit judges, and the district judge for the district, concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, means and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.<sup>26</sup>

### § 115. Extent of This Power.

The circuit and district courts may make rules of practice, but they cannot create rules of law. Thus, a district court promulgated a rule in admiralty to the effect that among admiralty claims of otherwise equal dignity, the one first libelling should be first paid. This contravened the general principle of admiralty law that every maritime lien dates from its inception and does not depend on the date at which enforcement is sought. Accordingly, the rule was held by the circuit court of appeals to be invalid. Said the court: "Rights acquired under the statutes of the United States, or under the general maritime law, which these courts are created to administer, are rules of property, and it is beyond the potency of judicial power to alter them or take them away by rules of practice."<sup>27</sup>

6 L. ed. 941; *Seymour v. Phillips et al.* Construction Co. (1877) Fed. Cas. No. 12,689.

<sup>25</sup> Revised Statutes, sec. 918: "The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the supreme court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice, as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

<sup>26</sup> A rule dispensing with proof of the execution of a note, in a suit on the same, unless the defendant shall make

an affidavit denying the execution of the note, is within the power of the circuit court. The object of such a rule is to avoid expense and delay. It does not attempt to control the rules of evidence and does not attempt to deny the right of the defendant to insist on proof of execution, but merely requires him to give notice by affidavit that he intends to contest the fact of the execution of the note. *Mills v. Bank* (1826) 11 Wheat. 431, 6 L. ed. 512.

A rule of practice of the court of the District of Columbia requiring a sworn affidavit of defense before the plaintiff's sworn affidavit of action in a cause arising out of contract may be contested is valid. *Fidelity & Deposit Co. v. United States* (1902) 187 U. S. 315, 47 L. ed. 194.

<sup>27</sup> *Saylor v. Taylor* (C. C. A.; 1896) 23 C. C. A. 343, 77 Fed. 476.

### § 116. Adoption of State Practice.

The various circuit and district courts may, in their own rules, adopt the equity practice followed in state courts, if the same is consistent with the laws of the United States and with the rules promulgated by the supreme court.<sup>25</sup>

1. *Steam Cutter Co. v. Jones* (1882) 13 Fed. 567: The circuit courts have power by their own equity rules to adopt the writ of attachment as a *meane* process against the owner of real estate situated in the state where the court sits. This conclusion was reached in the particular instance because the practice in question was adopted by a rule of the circuit court of Vermont from the local equity practice of that state. The court observed: "It is not to be supposed that any circuit court would adopt it unless it were derived from the equity practice of the state, and there seems to be great propriety in giving such process to a plaintiff in the circuit court, as otherwise he would be at a disadvantage, as compared with another plaintiff in the state court of chancery, in a suit against the same defendant, under the same circumstances."

It was insisted that the use of *meane* process by attachment in advance of adjudication was subversive of well-established doctrines of equity, but the court remarked that the use of such process merely gave a *meane* security and operated like a temporary injunction on the filing of a *lis pendens*; and it was added that it might well be regarded as a proper and useful equitable remedy.

2. *Rendell v. Venable* (1883) 17 Fed. 162: Under section 917, R. S., express power is given to the supreme court to make rules in regard to the taking and obtaining of evidence. In section 918, R. S., defining the authority of the lower courts to make rules, this power in regard to the taking and obtaining of evidence is not included. Furthermore, by sections 862 *et seq.*, R. S., Congress has made specific provisions for the taking of evidence. Consequently, prior to a late statute, it was beyond the power of a circuit or district court, by a rule of practice, to adopt the method of taking depositions that maintains in the state where the court is held.<sup>26</sup>

3. *Single v. Scott Paper Mfg. Co.* (1893) 55 Fed. 553: The circuit court, having jurisdiction of a suit for the specific performance of a contract to convey real estate, gave effect in this case to a local statute which provided that in case the defendant should fail to execute the conveyance within the appointed time then the decree should operate as a conveyance.<sup>27</sup>

### § 117. Scope and Interpretation of Rules Made by Lower Courts.

No circuit or district court of the United States has power to adopt a practice inconsistent with the rules promulgated by the supreme

<sup>25</sup> The federal court for the Eastern District of Louisiana by a rule of practice has adopted the proceeding known in that state as "executory process," but the proceeding known as "provisional seizure" has not been so adopted. Neither of these proceedings is known to the equity practice of the English High Court or the federal courts at large in this country. *Marchand v. Sobral* (1895) 24 Fed. 316.

<sup>26</sup> But by Act of March 9, 1892, ch. 14, § 27 Stat. L. 7, the taking of depositions in the mode provided in the state laws is expressly authorized. See 3 Fed. Stat. Ann. 22 and note.

<sup>27</sup> See also *A. W. Sprague Mfg. Co. v. Hoyt* (1896) 29 Fed. 421.

court or to disregard their provisions.<sup>21</sup> Hence, if practicable, that interpretation of a rule made by one of these courts must be adopted that harmonizes it with the supreme court rules.<sup>22</sup>

### § 118. Power of Equity Courts to Order Proceedings in All Cases.

In addition to the power of making rules of general application to govern their practice at large the circuit and district courts have the power, inherent in all courts of justice, to make such orders and special rules as may be necessary for the proper conduct of the particular cause. Such orders must be in harmony with the law and practice of the court and suited to the particular exigency.

*Neff v. Pennoyer* (1875) 3 Sawy. 335: A circuit court has power by special order in a particular case to require the parties to file printed briefs. This is a step that may sometimes well be taken as "necessary and convenient for the advancement of justice and the prevention of delay in proceedings." Such an order is not inconsistent with any act of Congress or rule of the supreme court, and it is such as all courts of record in the exercise of the power inherent in them to regulate the practice before them are accustomed to make.<sup>23</sup>

### *Practice of English Chancery.*

### § 119. When Usages of English Chancery Followed.

If the practice to be followed on a particular point is not determined by any law of the United States or by the equity rules made by the supreme court or by the rules of the circuit or district court itself, resort is next to be had to the usage and practice of the English High Court of Chancery as the same stood in the year 1842, when the present equity rules were adopted. On this point one of the equity rules provides as follows:

**Equity Rule 90:** In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

<sup>21</sup> *U. S. Bank v. White* (1834) 8 Pet. 263, 269, 8 L. ed. 938, 941; *Story v. Livingston* (1839) 13 Pet. 359, 368, 10 L. ed. 200, 204; *Gaines v. Relf* (1841) 15 Pet. 9, 16, 10 L. ed. 642, 644. <sup>22</sup> *Jenkins v. Greenwald* (1857) 1 Bond, 126, 134. <sup>23</sup> See *Jordan v. Agawam etc. Co.* (1869) 3 Cliff. 239.



**§ 120. Usage Must Be Conformable to Spirit of American Practice.**

This rule contemplates the adoption of the English chancery practice, on points not specifically covered by the equity rules, where such practice is appropriate to particular conditions and "local conveniences," and not out of harmony with the spirit and tendencies manifested in the federal system. It is plain that a marked tendency of our equity system is to simplify practice and facilitate the hearing of suits on the merit. Rules of English chancery practice that make against this tendency could not be considered as furnishing such analogies as would entitle them to be followed here. On the other hand, English rules of practice that tend strongly in the direction of abbreviating litigation and towards relieving the parties and the courts from unnecessary proceedings should be adopted, if they are otherwise in harmony with our system of practice.<sup>24</sup>

**§ 121. Authority of English Decisions and Books of Practice.**

The decisions of the English chancery courts prior to 1842 and the books of English writers of accepted authority published before the same date constitute a source of authoritative law in matters of equity pleading and practice to which practitioners in the federal courts of equity may sometimes profitably resort. Among such treatises by English authors there are three that should not be overlooked, as they are of established authority and their statements concerning matters of equity pleading and practice always carry weight. The first is the "Treatise on Pleadings in Suits in the Court of Chancery," by John Mitford (afterwards Lord Redesdale). This book first appeared in 1782, and its merit was quickly recognized. It has exerted a very considerable influence on the development of the science of equity pleading. Another work of unquestionable merit is "A Treatise on the Practice of the Court of Chancery," by John S. Smith, of the Six Clerks' Office. The second edition of this work appeared in 1837, and the first edition had come out about two years earlier. Its value is due to the fact that it was written by one who was intimately versed in the details of the court practice.

The best known and, in many respects, the most authoritative English work on equity pleading and practice, is the "Treatise on the Practice of the High Court of Chancery," by Edmund R. Daniell.

<sup>24</sup> *Emma Silver Min. Co. v. Emma etc.* of a plea of former suit pending, on Co. (1890) 1 Fed. 39. It was here held former adjudication, can be followed in that the English practice of referring a the federal courts. cause to a master to ascertain the truth

The first edition, in three volumes, appeared in 1837-1840. It is learned, accurate, and exhaustive; and as a consequence it has, through numerous editions, remained a standard work until our own day. It must be remembered that the editions of Daniell and Smith that may be cited as authoritative in the federal courts are those mentioned above, namely, the second edition of Smith and the first edition of Daniell.<sup>35</sup> The later editions of Mr. Daniell's treatise are not to be fully relied on in the federal courts, for those editions contain many changes. English books and rules of practice published or adopted subsequent to the promulgation of our equity rules in 1842 are not authoritative in federal courts to the same extent as books and rules based on the practice prior to that date.<sup>36</sup>

### § 122. English Orders in Chancery.

In the decade preceding the adoption of our equity rules of 1842, the English chancery court had adopted several series of orders in chancery.<sup>37</sup> Our equity rules of 1842 are largely based on these several series of orders, and it may be stated with confidence that the draughtsman of the equity rules appropriated about all in the existing English Orders that could be considered applicable to our practice. In other words, the English Orders in Chancery (except so far as they are embodied in our own rules) are no longer of much value to us, and this source of precedents in equity practice may be considered to have been pretty well exhausted in the compilation of our rules. In considering the extent to which English precedents may be utilized in the equity practice of the federal courts and the weight to be given to the English orders, it is to be borne in mind that the federal equity procedure, by its own internal growth, has now become an extensive system. To a large extent it furnishes its own analogies and its own precedents. Consequently the need for resorting to the parent system is not great at this day, and the tendency is less and less in that direction. In the light of the author's own experience, he is minded to say that the help to be gotten by federal practitioners from the modern rules and English practice is not as great as has sometimes been supposed.

<sup>35</sup> See the words of Mr. Justice Bradley, speaking for the court, in *Thomson v. Wooster* (1886) 114 U. S. 104, 29 L.ed. 105. Also *U. S. v. Anonymous* (1884) 21 Fed. 786, note. The editions mentioned are the editions to which reference is made throughout this work.

<sup>36</sup> *City of Detroit v. Detroit City Ry. Co.* (C. C. A.; 1893) 65 Fed. 572.

<sup>37</sup> Orders of April 3, 1828, as amended Nov. 23, 1831; Orders of Dec. 21, 1833; Orders of May 10, 1839; Orders of Aug. 26, 1841. See Appendix to this work.

*Unwritten Rules and Usages of Court.***§ 123. Usage Based on Principles and Analogies of English Practice.**

From what has been said above, it appears that the circuit and district courts of equity are controlled in matters of equity pleading and practice, first, by laws of the United States, secondly, by rules prescribed by the supreme court, thirdly, by their own proper rules, and, lastly, by the usages and practice of the English High Court of Chancery as the same stood in 1842. Underlying and supporting the whole is a large and indefinite mass of unwritten rules. It is the duty of the court from time to time to resort to these and from them to declare the proper practice in particular cases when no precedent or specific rule directly applicable is at hand. Under this head, valuable reasoning analogies may sometimes be found in the decisions of any court of equity deriving its practice from the English chancery, and also in the decisions on points of practice found in English cases subsequent to 1842.

**§ 124. Validity of Unwritten Rules.**

It is desirable that the practice of the courts should be evidenced, so far as practicable, by written rules, as certainty and uniformity are thereby more easily and readily secured. Nevertheless, uniform usage can establish a rule of practice quite as certainly and effectively as if the practice were reduced to writing. What is the uniform usage and practice of the court? That is always a pertinent question. Whether the rule has been reduced to writing or not merely concerns the evidence of the rule.<sup>28</sup> Where it appears that the court has no written rule of practice applicable to a particular case, the correct principle to be followed by the court may be deduced from the course of decision in similar or analogous cases.<sup>29</sup>

<sup>28</sup> *Duncan v. U. S.* (1823) 7 Pet. 435, 451, 8 L. ed. 739, 745; *United States v. Stevenson* (1869) 1 Abb. (U. S.) 495, Fed. Cas. No. 16,395.

<sup>29</sup> *Lamb v. Parkman* (1859) Fed. Cas. No. 8,019.

The supreme court, in sustaining a case where the federal court in Ohio had tacitly followed the state practice on a particular point for twenty-five years, once observed: "Written rules are unquestionably to be preferred because

their commencement, and their action, and their meaning, are most conveniently determined; but what want of certainty can there be where a court by long acquiescence has established it to be the law of that court that the state practice shall be their practice, as far as they have means of carrying it into effect, or until deviated from by positive rules of their own making?" *Fullerton v. Bank* (1828) 1 Pet. 604, 613, 7 L. ed. 230, 234.

**§ 125. Presumption as to Origin of Unwritten Rule.**

Any legitimate practice that appears to have been in existence for a number of years will be presumed to have been inaugurated and established under the order of the court.<sup>40</sup>

*Application and Interpretation of Written Rules.***§ 126. Authoritative Force of Written Rules.**

The rules of practice formulated by the supreme court for its own guidance and for the guidance of the inferior courts, and the rules of practice formulated by the inferior courts themselves for their own guidance and made in pursuance of authority granted to those courts by statute, have the force and effect of positive statutory rules of law. Those rules are made to secure uniformity. They are intelligible, and they are also easily within the knowledge of all practitioners. It follows that the practice of the courts should always be in conformity with them; and much inconvenience may result if they are disregarded.<sup>41</sup>

**§ 127. How Interpreted.**

The rules promulgated by the supreme court are, generally speaking, to be interpreted and applied as any statutory enactment of a law-making power would be interpreted and applied. Thus the word "may" in equity rule 92 has been construed to mean "shall" or "must," and not as conferring a mere discretion, the same principle of interpretation being here applied as would have been proper in the interpretation of a statute.<sup>42</sup>

**§ 128. Must Be Construed to Harmonize with Statutory Provisions.**

As the supreme court has no power to make a rule that will conflict with any law of the United States, it follows that, of two different interpretations of an equity rule, the interpretation must be adopted that will harmonize it with the enacted law.<sup>43</sup>

<sup>40</sup> *Koning v. Bayard Jr.* (1829) 2 Keith (1896) 23 C. C. A. 196, 77 Fed. Paine, 251, Fed. Cas. No. 7,924. 374. See *Seattle etc. R. Co. v. Union*

<sup>41</sup> *American Graphophone Co. v. National Phonograph Co.* (1904) 127 Fed. 179.

<sup>42</sup> *Gray v. Chicago etc. R. Co.* (1884)

<sup>43</sup> *Northwestern Mut. Ins. Co. v. Woolw.* 63,

### § 129. Rules of Practice Liberally Construed.

Nevertheless, it is to be borne in mind that the equity rules established by the courts are not positive rules of decision on matters of substantive right. They are merely rules of practice, and they are to be construed and applied accordingly. Rules of practice should, it is held, be liberally construed in furtherance of the proper administration of justice.<sup>44</sup> Thus they will be treated as being prospective in operation, where to consider them otherwise would result in defeating a suit commenced prior to their promulgation or alteration.<sup>45</sup> It has been said that the inflexible enforcement of rules of practice which would result in the dismissal of a suit on purely technical grounds is abhorrent to the principles of equity.<sup>46</sup> Where the rule of practice pertaining to a particular point is unsettled the court is always inclined to indulgence.<sup>47</sup>

### § 130. Judicial Discretion on Matters of Practice.

The application of rules of practice should be so tempered with judicial discretion as to promote the due administration of justice;<sup>48</sup> and such rules are not so far superior to the discretion of the court as to deprive it of the power to secure the trial of causes on their merits.<sup>49</sup> "The ends of justice," it has been said, "must not be sacrificed to mere form or by too rigid an adherence to technical rules of practice."<sup>50</sup> The law of practice is a law of convenience and the purpose of it is to expedite the proper and just administration of the law. There are of course many settled principles of practice that must be applied without hesitation and without deviation, but there are also undoubtedly many other principles of practice that are less important. These concern matters of small moment or matters that come up only in rare cases. Here the principles to be applied cannot be supposed to be so universally known as the others, and hence greater latitude must be permitted in the application of them.<sup>51</sup>

<sup>44</sup> *Hazleton etc. Co. v. Citizens' St. Ry. Co.* (1896) 72 Fed. 325.

<sup>45</sup> *The St. Lawrence* (1861) 1 Black, 522, 17 L. ed. 180; *The Selt* (1872) 3 Biss. 344, Fed. Cas. No. 12,649.

<sup>46</sup> *Barrett v. Twin City Power Co.* (1901) 111 Fed. 45.

<sup>47</sup> *La Vega v. Lapsley* (1871) 1 Woods, 428, Fed. Cas. No. 8,123.

<sup>48</sup> "I think it the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different

circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy. This has always been the principle of this court, though not at all times sufficiently attended to." *Lord Cottenham in Wallworth v. Holt* (1841) 4 Myl. & C. 636.

<sup>49</sup> *Mutual Bldg. etc. Bank v. Boasieaux* (1877) 1 Hughes, 386, Fed. Cas. No. 9,877.

<sup>50</sup> *Harlan, J. in Hardin v. Boyd* (1885) 113 U. S. 756, 28 L. ed. 1141.

<sup>51</sup> See *Ward v. Sherman* (1904) 192 U. S. 166, 48 L. ed. 391.

§ 131. Application to Enlarge Time Prescribed in Rule.

A circuit court, in applying its own rules, may modify their operation when timely application is made to that end. Thus under a rule requiring pleas in abatement to be filed within two days after the commencement of a term and not afterwards, a court may, on motion, enlarge the time for the filing of the plea. "Such rules are mere engines to promote convenience in business, and when, from any peculiarity, they require to be suspended or waived in order to promote justice, the power which made them can and ought to suspend them."<sup>52</sup>

§ 132. When Departure from Rule Not Reversible Error.

The supreme court has repeatedly declared that it will not reverse a chancery decree for departures from technical rules when it can see that no harm resulted.<sup>53</sup>

1. *Kelsey v. Hobby* (1842) 16 Pet. 269, 10 L. ed. 961: While a suit was pending in equity for the dissolution of a partnership and an accounting, the plaintiff executed a release in respect to the matters concerning which the suit was brought. The defendant filed the release in the cause and at a later stage moved to dismiss the bill. It was insisted by the plaintiff that the release should have been introduced by supplemental answer or by cross-bill. But it appeared that the release had been admitted as evidence without objection, and proof had been taken by the respective parties on the question of its having been obtained by duress. It was held that the mode in which the release had been introduced into the suit was not open to exception on appeal.

2. *Gila Bend etc. Co. v. Gila Water Co.* (1906) 202 U. S. 270, 50 L. ed. 1023: The mere absence of a formal order authorizing and perfecting the consolidation of two or more causes was held not to vitiate the record where it was apparent that the court treated the causes in question as being consolidated and entered a judgment explainable and sustainable only on the theory that they were consolidated. The absence of the formal order could not prevail over the essential action of the court.

§ 133. Considerations Governing Application of Rules.

Some light on the principle to be applied in the interpretation and application of rules of practice, is to be found in the suggestion once

<sup>52</sup> *Wallace v. Clark* (1847) Fed. Cas. No. 17,098. form of a suit for a money debt, when he should have sued for breach of a contract for the delivery of cattle, will

<sup>53</sup> *Allis v. Insurance Co.* (1877) 97 U. S. 144, 24 L. ed. 1008; *Hornbuckle v. Stafford* (1884) 111 U. S. 389, 28 L. ed. 468. not operate in equity as an election of the plaintiff, so as to destroy his just rights. *Ward v. Sherman* (1904) 192 U. S. 168, 48 L. ed. 391.

A technical mistake of counsel in bringing an action for his client in the

put forth by Mr. Justice Clifford in these words: "Rules of practice are established to promote the ends of justice, and where it appears that a given rule will have the opposite effect, appellate courts are inclined to regard the case as one of an exceptional character."<sup>54</sup> This apparently sanctions the idea that, in exceptional cases, the courts may flatly refuse to enforce a plain rule of practice clearly applicable to the particular facts. This language was used in connection with a case involving the judicial discretion of the appellate court, and the principle declared is to be guardedly received and cautiously applied. On one occasion Mr. Justice Story observed that the authorities, and particularly the American authorities, proceed on the idea that matters of practice are to be decided largely on considerations of policy and convenience, rather than as matter of absolute principle;<sup>55</sup> but in the same case a note of dissent was sounded by another judge who insisted that this principle could not be so far extended as to cause the overturning of known established rules.<sup>56</sup>

#### § 134. General Principle.

The general conclusion to be drawn from the authorities may be stated as follows: The rules are established for the guidance of the courts; and except as their operation may be suspended or modified by the courts in the exercise of a judicial discretion, those rules are the law. The judicial discretion of the courts is such that they may by particular orders excuse a party from complying with a rule when compliance is impossible or impracticable, or in any case where the enforcement of the rule would entail undue hardship. This power is most frequently exercised in connection with the rules in regard to the time for taking the various steps necessary to prepare a cause for hearing. A court of equity always has a power, within limits, to control and order the proceedings in a cause before it; and this power it will exercise in furtherance of the proper administration of justice. But this power and discretion of the court must be invoked at the proper time and in the proper way. If a litigant disregards a rule and allows the cause to pursue its course without appealing to the court to relieve him from the consequence of disregarding the rule,

<sup>54</sup> *Stickney v. Wilt* (1874) 23 Wall. 150, 162, 23 L. ed. 50, 54. Compare the language of the same judge in *Cleveland Ins. Co. v. Globe Ins. Co.* (1878) 98 U.S. 274, 25 L. ed. 203, <sup>55</sup> *Minor v. Mechanics Bank* (1828) 1 Pet. 48, 80, 7 L. ed. 47, 61. <sup>56</sup> *Johnson, J.* dissenting in *Minor v. Mechanics Bank* (1828) 1 Pet. 81, 7 L. ed. 62.

and without asking for leave to cure the defect incident to its violation, then he must in the end pay the penalty. Finally, the appellate courts recognize the power of the lower courts, in their discretion, to order the proceedings in such a way as to secure the administration of justice; and on appeal the proceedings will not be disturbed for light infractions of the rules, where it appears that the ends of substantial justice have been reached.

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## CHAPTER IV.

### BILL IN EQUITY.

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*Bill and Information.*

**§ 135. General Nature of Suit in Equity.**

A judicial proceeding in the court of chancery or in any court exercising equity powers is called a suit. The proceeding in a court of common law, on the other hand, is called an action. The suit in equity is regularly begun by the filing of a bill. This is nothing more than a petition for relief addressed to the court by the party seeking relief and stating the facts on which the claim for relief is based.

**§ 136. Information in Equity.**

The ordinary bill in equity is brought by a private party having a private interest to assert or protect. Formerly when a suit in equity was instituted on behalf of the government, or in behalf of those who partake of its prerogative or whose rights are peculiarly under the protection of the courts, the proceeding was by means of an information filed by the proper officer of the government, usually the attorney-general or solicitor-general.<sup>1</sup> An information in equity is proper where the right to be asserted is vested in the government, as where it seeks to enforce a mortgage,<sup>2</sup> or to remove an obstruction from a navigable river,<sup>3</sup> or where the right to be asserted is vested in some one under the protection of the government, the government being the proper formal party to institute the proceeding. A suit to protect or enforce a charity is maintainable in the form of an information in equity;

<sup>1</sup> 1 Dan. Ch. Pr. 3 *et seq.*

<sup>2</sup> *United States v. Pittsburgh etc. R.*

<sup>3</sup> *Benton v. Woolsey* (1836) 12 Pet. Co. (1886) 26 Fed. 113.

27, 9 L. ed. 987; *U. S. v. Hughes* (1850)

11 How. 552, 13 L. ed. 809.

and the same proceeding is proper where the object is to protect the estates of idiots or lunatics.<sup>4</sup>

### § 137. Difference between Proceedings by Bill and Information.

Informations in equity are to all intents and purposes the same as bills in equity, and they differ only in form and name. The general idea underlying the distinction is that where an individual appears as a plaintiff in a court of equity, he must assume the rôle of an orator and pray for the relief to which he is entitled; whereas if the government institutes a suit, it is not necessary to do more than inform the court of the facts justifying relief. In such case it is the duty of the court to act upon a sufficient showing and grant relief without requiring a prayer. It is the prerogative of the government to command justice of its courts upon information only.<sup>5</sup>

### § 138. Present Practice in Federal Courts.

The distinction between bills and informations in equity is recognized in the federal courts, and in any case where an information could be maintained according to the practice of the English chancery, such a proceeding can now be maintained in these courts, unless the proceeding by bill is made the proper remedy by statute. However, according to the present practice of the federal courts, the information in equity is almost obsolete, the ordinary bill in equity being used in suits brought by the government as in suits by private persons.<sup>6</sup> The practice of using the bill in equity instead of the information, in suits instituted in the federal courts by or on behalf of the government, has become more common by reason of statutory provisions enacted from time to time authorizing the attorney-general

<sup>4</sup> 1 Dan. Ch. Pr. 5.

<sup>5</sup> *Attorney General v. Molitor* (1873) 26 Mich. 444.

<sup>6</sup> For illustrations of bills in equity by government to vacate patent of invention, see *United States v. Bell Tel. Co.* (1888) 128 U. S. 315, 32 L. ed. 450, 9 Sup. Ct. 90; *United States v. Doughty* (1870) 7 Blatchf. 424; *Attorney General v. Rumford Chemical Works* (1876) 32 Fed. 608.

For illustrations of bills in equity by government to cancel land patent, see *United States v. Stone* (1864) 2 Wall. 525, 17 L. ed. 765; *Moffat v. United States* (1884) 112 U. S. 24, 28

L. ed. 623; *United States v. Minor* (1885) 114 U. S. 233, 29 L. ed. 110; *Mullan v. United States* (1886) 118 U. S. 271, 30 L. ed. 170; *Colorado Coal & Iron Co. v. United States* (1887) 123 U. S. 307, 31 L. ed. 182; *United States v. San Jacinto Tin Co.* (1888) 125 U. S. 273, 31 L. ed. 747; *United States v. Beebe* (1888) 127 U. S. 338, 32 L. ed. 121; *United States v. Marshal Silver Min. Co.* (1889) 129 U. S. 579, 32 L. ed. 734; *Williams v. United States* (1891) 138 U. S. 514, 34 L. ed. 1026; *United States v. Throckmorton* (1878) 98 U. S. 61, 25 L. ed. 93.

to bring suits in equity in the name of the United States for the purposes indicated in such statutes.<sup>7</sup>

### § 139. Form in Which Information Prosecuted.

The procedure in suits prosecuted by information is, in all substantial particulars, the same as the procedure in ordinary suits conducted by bill; and consequently the information will not be a subject of special treatment in this book. It may be noted that informations instituted by or on behalf of the United States in the federal courts should be brought in the name of the government upon the relation of the attorney-general,<sup>8</sup> rather than in the name of the attorney-general.<sup>9</sup> In whatever form the information is brought it should show on its face in no uncertain manner that it is instituted and prosecuted by and under the authority of the proper officer.<sup>10</sup>

### *Original and Dependent Bills.*

### § 140. Essentials of Proceeding in Equity.

The essential conditions of a proceeding by bill in equity are (1) the existence of a court exercising equity powers, (2) the existence of a controversy, between adverse parties, such as may be heard and adjudicated in that court, (3) the filing of a proper bill by the plaintiff against the defendant, (4) the exercise of compulsory power to bring the defendant into court, and (5) an adjudication on the merits. In this chapter we are more immediately concerned with the function, nature, and form of the bill.

### § 141. Original Bill in Equity.

A bill that begins an independent suit in equity unconnected with any other previous or pending suit in the same court is called an original bill. Such a bill relates to some matter not before litigated between the same parties. As the term original imports, the original bill first moves and begins the litigation. The word original is here used in its natural and untechnical sense, and it has no reference to the original writ by which common-law actions are begun.

<sup>7</sup> *United States v. Union Pac. R. Co.* 32 Fed. 608 (information in name of attorney-general of (1878) 98 U. S. 569, 25 L. ed. 143).

<sup>8</sup> *Benton v. Woolsey* (1838) 12 Pet. the United States and not in the name of the attorney-general. 27, 31, 9 L. ed. 987, 988; *United States v. Doughty* (1870) 7 Blatchf. 424; *be demurrable*).

*United States v. Pittsburgh, etc. R. Co.* 10 U. S. v. Doughty (1870) 7 Blatchf. 425; *United States v. McAvoy* (1886) 26 Fed. 113.

<sup>9</sup> *Attorney General v. Rumford Chem-* 4 Blatchf. 418.

**§ 143. Dependent Bill.**

All bills other than original bills are usually classed, somewhat awkwardly it must be confessed, under the head of bills not original. The terms "original bill" and "bill not original" are, of course, mutually exclusive, and these terms supply us with the fundamental divisions of bills in equity. The value of this classification is perhaps not very great, but if any division is to be made here it would seem desirable to choose a more apt expression for bills falling in the second class. The word "dependent" seems to fill the requirement well enough, for it gives expression to the most striking feature of bills that are not original bills. We may say then that all bills in equity are divided into two main classes, namely, original bills and dependent bills. The original bill, as has already been indicated, starts a new and independent litigation; the dependent, or non-original, bill is one that relates to some matter already litigated in the court by the same parties, and such a bill is dependent upon the prior suit, that is to say, it supplements or continues the former suit, or seeks relief in respect to some matter growing out of that suit and connected with it.

**§ 143. Bills of Mixed Character.**

Though, generally speaking, all bills may be said to be either original or dependent, it should be added that there are some bills that are of a mixed character and partake of the nature of both. These may be classed as original bills in the nature of a dependent bill or dependent bills in the nature of an original bill, according as they appear to partake more largely of the nature of the one or the other.

**§ 144. Two Types of Dependent Bills.**

The different sorts of dependent bills will be particularly dealt with in the progress of this work, but in order that their general character may be the better understood, it will be well to specify the most important here. These bills then are of two general types, first, those that continue the suit begun by the original bill and that seek to carry that suit on to its own proper completion, and, secondly, those which are brought for the purpose of cross-litigation, or to suspend, controvert, or reverse some decree or order of the court in the main litigation, or to carry such former decree into execution.<sup>11</sup>

<sup>11</sup> Story Eq. Pl. § 20.

**§ 145. Illustrations of First Type.**

The first type comprises: (1) The supplemental bill, which is merely an addition to the original bill, to supply some defect in its frame or structure resulting from matter arising subsequent to the institution of the suit. (2) The bill of revivor, the purpose of which is to bring some new party before the court when, by death or otherwise, the original party has become incapable of prosecuting or defending the suit. This bill is merely a continuance of the original bill. (3) In addition to these two, there is the combined bill of revivor and supplement. It continues the former suit by reviving it and also supplements it by supplying defects arising subsequent to the institution of the suit.

**§ 146. Illustrations of Second Type.**

The second type of dependent bills comprises: (1) The cross bill, exhibited by the defendant in the original bill against the plaintiff touching some matter in litigation in that suit and seeking affirmative relief in respect thereto. (2) The bill of review, which is brought to examine and reverse a decree made upon a former bill, when such decree has been duly entered upon the records of the court and when it has thereby become fully effective. (3) The bill to carry a decree, made in a former suit, into execution. Again, a bill may combine the features of two or more of the bills above enumerated. Thus, a bill may be filed to supplement and review, to revive and review, or to revive and execute, a former decree of a court.

**§ 147. Original Bill in Nature of Dependent Bill.**

Still again, as was said above, an original bill may sometimes partake of the characteristics of one or more of the several dependent bills. Thus we may have the original bill in the nature of a supplemental bill, the original bill in the nature of a bill of revivor, the original bill in the nature of a bill of review, and the original bill in the nature of a bill to execute a decree. These peculiar bills apparently differ from the several dependent bills to which they are assimilated only in the circumstance that they are brought by persons not in privity with the prior record, such persons being thereby disabled to proceed otherwise than by an original proceeding.

**§ 148. Dependent Bill in Nature of Original Bill.**

The bill to impeach a decree for fraud and the bill to suspend or avoid a decree on the ground of matter which has arisen subsequent

to the entering of the decree seem to be illustrations of bills that should be classed as dependent bills in the nature of original bills. They are dependent, or non-original, in the sense that the litigation contemplated in such suits has its origin and source in the prior controversy and the jurisdiction of the court is derived from and dependent on its jurisdiction over the prior suit: they are original in the sense that the ground on which the claim to relief is based arises outside of the matters embraced in the prior suit.

### *Classification of Original Bills.*

#### **§ 149. Original Bill as Normal Type of Bill.**

The original bill is the normal type of the bill in equity, and by far the greater part of litigation in equity is conducted in suits begun by bills of this kind. It may be observed that the principles of pleading and practice applicable to proceedings by original bill are also applicable, in great part, to suits begun by dependent bills; and so far as the proceedings in dependent suits depart from the normal rules of pleading and practice, such proceedings will be made the subject of special treatment. It follows that the body of this treatise is so designed as to be chiefly concerned with the procedure in suits begun by original bills. To this end we shall give an account of the pleadings in such suits and of the various steps that should or may be taken in conducting such a suit to a successful termination.

#### **§ 150. General Observation on Classification of Original Bills.**

Original bills can be variously classified and subdivided, according as the problem is considered from the view point respectively of substantive or remedial law. The student of equity jurisprudence, if called upon to specify the different sorts of original bills, might reasonably be expected to answer with reference to the various heads of equitable relief. For instance, he might well say that the different sorts of original bills are such as these: the bill of account, the bill for cancellation, the bill of discovery, the bill of injunction, the bill to enforce a trust, the bill to marshal assets, and so on. It is manifest that the student of equity pleading and practice will consider the matter in a very different light. He looks primarily to matters of procedure and is more interested in the steps taken while the suit is in progress than in the actual result of the contest. Instead of considering the relief that is or may be obtained at the end of the suit, he examines the form of the bill and the processes by



which that relief is obtained. It is in the latter aspect that we proceed to consider the different sorts of original bills; and, accordingly, we submit that all original bills are either (1) bills of discovery and relief, (2) bills of discovery, or (3) bills of relief. This very simple classification of original bills constitutes somewhat of a departure from that commonly received, and a few words of explanation are perhaps desirable. The only merit claimed for this division of original bills is that it is simple and convenient. It also comports with the past history of the development of the bill and with the theory underlying its structure. The matter is not one about which scientific precision is either possible or necessary.

#### § 151. Commonly Accepted Classification of Bills—Bill of Relief.

The classification of original bills usually accepted by writers on equity pleading is that which divides them into bills praying relief and bills not praying relief.<sup>10</sup> Under the head of bills praying relief are put the following three sorts of bills: (1) the bill of *certiorari*, (2) the bill of interpleader, and (3) the ordinary bill for relief.<sup>11</sup>

#### § 152. Bill of Certiorari.

The bill or petition of *certiorari* is designed merely to enable a defendant who has been sued in an inferior court of equity to remove the suit into the superior court of equity properly having jurisdiction of such suit. Such bill, or petition, of *certiorari* is addressed to the equity court to which it is desired to remove the suit in question, and it neither prays for process nor for an answer but merely for a removal. This bill, we submit, is not a bill in equity in any proper sense at all. It does not originate any litigation and no decree whatever is founded on its allegations. It is merely one of those numerous petitions so often used by courts of equity, and other courts in the course of a pending litigation, to direct or control the proceedings. No account ought therefore to be taken of it in any attempt to classify original bills. In addition to this, it may be said that the bill of *certiorari* was always of very rare occurrence in England. It can seldom or never be needed in any country where the respective jurisdictions of the various courts are properly defined and limited. Hence we observe that the bill of *certiorari* is practically unknown in America. The proceeding most analogous to it in

<sup>10</sup> 1 Dan. Ch. Pr. 402; Story Eq. Pl. § 18. For purposes of convenience we have reversed the order in which these

§ 17.

<sup>11</sup> 1 Dan. Ch. Pr. 403; Story Eq. Pl. three sorts of bills have been arranged.

the practice of the federal courts is the petition for *certiorari* to enforce, in certain cases, the removal of a record from a state court to a federal court.<sup>14</sup> But it has never been suggested that such a petition, even when used to remove an equity suit, is to be treated as an original bill in equity. Evidently it is not to be considered such.

### § 153. Bill of Interpleader.

The bill of interpleader is a bill filed by one who, as a sort of stakeholder, asserts no claim to the subject in controversy but who on the contrary seeks to be exonerated of all responsibility in respect to the same by bringing before the court all those who do in fact make claim to it, and thus securing an adjudication of the court in regard to their several claims. In respect to this sort of bill we submit that it is improper to make it a distinct subdivision of bills praying relief. The bill of interpleader does indeed have some features that distinguish it from other bills praying relief; but other bills praying relief also have their own distinguishing features. The bill of account, for instance, is quite different from the bill of injunction or bill for specific performance. The subject of interpleading is in truth one of the distinct heads of equitable relief, and the bill of interpleader ought therefore to be considered as being in the same general class with other bills for relief, and it should not be put into a distinct category by itself. The difference that exists between it and other bills of relief is not due to any diversity of species but merely to individual peculiarities, such difference being solely based on a consideration of the nature of the relief sought and obtained in such a bill.

### § 154. Simple Bill of Relief.

Under the commonly accepted classification of bills praying relief, the third division comprises all ordinary bills for relief, but as the scope of the class has to be so limited as to exclude bills of interpleader and bills of *certiorari*, this third class is defined as consisting of those bills which pray for a decree or order of the court "touching some right, claimed by the party exhibiting the bill, in opposition to some right, real or supposed, claimed by the party against whom the bill is exhibited, or touching some wrong done in violation of the plaintiff's right."<sup>15</sup> It is clearly only a sort of residuary division,

<sup>14</sup> Act of March 3, 1875, sec. 7. See *Helena, etc. Smelting Co.* (1891) 48 *Wilkinson v. Delaware, etc. R. Co.* Fed. 609. (1898) 23 Fed. 862; *Scott v. Clinton*, <sup>15</sup> Story Eq. Pl. § 17; 1 *Dan. Ch. Pr.* etc. R. Co. (1876) 6 *Biss.* 537; *Id.* re 403.

and as the bill of interpleader is artificially thrust into a distinct division, this residuary division has to be artificially defined in order to comport with the necessities of the situation. It is needless to say that nothing much is gained by this process.

#### § 155. Bills Not Praying Relief.

The second division of original bills, as commonly received, comprises those not praying relief. These are divided into three subdivisions as follows: (1) the bill to perpetuate testimony, or to take testimony *in perpetuam rei memoriam*, (2) the bill to take testimony *de bene esse*, and (3) the bill of discovery. All these bills are directed to securing and preserving testimony to be used in pending or future litigation. We shall have occasion to treat of these bills more fully hereafter. It is sufficient at this juncture to observe, on the question of classification, that while these bills do, as a matter of fact, differ in certain striking features from bills praying relief, they are founded upon equitable right and in a certain sense are also bills for relief. The right to perpetuate testimony, the right to take testimony *de bene esse*, and the right to have discovery, are all and each of them specific heads of equity; and the bills brought to enforce such rights are in a true sense bills for relief. It is admitted that the equities on which these bills are founded are auxiliary equities, that is, they are equities that are of value only in so far as they contribute to put the plaintiff in a better position to enforce other equitable or legal rights. But these equities are none the less real, nevertheless.

#### § 156. Discovery and Its Bearing on Equity Procedure.

There is, however, one peculiarity of the bill of discovery which should be specially noted and pondered over. Discovery is a principle that manifests itself in the subject of equity pleading and practice in two forms. It is not only a distinct head of equitable relief; it is also a mode of procedure. In so far as discovery is a mode of procedure it may appear and be utilized in connection with a bill for any sort of relief whatever; and it is as a mode of procedure that the principle of discovery is chiefly important. No other fact or principle in the history of equity has indeed exerted nearly so much influence upon equity pleading and practice as this principle of discovery. The whole subject has been largely developed in conformity with this principle. In modern times discovery as a distinct head of equitable relief has become of very little importance, and discovery

as a principle of procedure has become of very much less importance than it used to be. But no intelligent presentation of the subject of equity pleading and practice can be made without taking account of the principle of discovery in all its bearings.

#### § 157. Classification Adopted in Present Work.

As we have already suggested, the commonly accepted division of original bills into bills praying relief and bills not praying relief does not seem to be very helpful, and inasmuch as it is not sufficiently grounded on fundamental principles to impose itself on us we are minded to discard it altogether.<sup>16</sup> Accordingly, we repeat, all original bills, viewed from the procedural point of view, are either (1) bills of discovery and relief or (2) bills of discovery or (3) bills of relief. This classification is not perhaps without some objectionable features, but it seems to afford the easiest and most natural line of approach to the subject of the original bill as we here propose to treat it. In bills of discovery and relief, the principle of discovery manifests itself solely in its aspect as a branch of the law of procedure. In the pure bill of discovery there is the independent equity of discovery, but it finds expression only through discovery as a mode of procedure. This bill is indeed a very curious one, and it is difficult to place it in any scheme. In the simple bill of relief, the principle of discovery is practically absent. It may be added that nearly all bills in equity brought nowadays are simple bills for relief.

The foregoing simple division of original bills having been made, no further attempt at sub-classification seems to be either desirable or practicable. Of course one could proceed to divide all bills in which relief is sought into sub-classes corresponding with the substantive heads of equity. Thus it could be said of bills of discovery and

<sup>16</sup> In the following passage Judge Story has explained the ordinary division of original bills into bills praying relief and bills not praying relief. The learned author perceives that the classification is based upon the adoption of a technical and somewhat artificial meaning for the word relief. "Original bills may be divided into those which pray relief, and those which do not pray relief. In a broad and general sense, all bills in equity may be said to pray relief, since they seek the aid of the court by some decree or decretal order, to remedy some existing or apprehended wrong or injury. But in the sense in which the words are used in courts of equity, such bills only are deemed bills for relief, as seek from the court in that very suit a decision upon the whole merits of the case set forth by the plaintiff, and a decree, which shall ascertain and protect present rights or redress present wrongs. All other bills, which merely ask the aid of the court against possible future injury, or to support or defend a suit in another court of ordinary jurisdiction, are deemed bills not for relief." Story, Eq. Pl. § 17. We submit that it is time to put this division of original bills out of the way, because it is neither helpful nor sound.

relief and of simple bills of relief that they comprise such bills as the following: the bill of account; the bill to cancel, or rescind, or reform; the bill to set aside a fraudulent conveyance; the bill of injunction; the bill of *ne exeat*; the bill of interpleader; the bill to marshal assets and securities; the bill of partition; the bill to quiet title; the bill for specific performance; the bill to enforce a trust, and so on through all the heads of equitable relief. But this would not be a proper method of sub-classification. It would merely be mixing two different systems of classification. But it may be observed that after a general treatment of the subject with reference to the simple division of bills indicated above, these various titles furnish convenient heads for such matter as requires special treatment concerning them.

#### *Form of the Bill.*

#### **§ 158. Structure of Bill of Discovery and Relief.**

We shall now proceed to consider the frame and form of the original bill of discovery and relief. Originally the bill in equity was quite simple in structure. As the equity powers of English chancery were first called into play in aid of the weak and oppressed, it was quite natural that those powers should be exercised without very strict regard to requirements of form. But in course of time the bill, as well as the other equity pleadings, assumed a very cumbersome and artificial form. This trouble has been in a great measure corrected in modern times, and the tendency is now towards simplicity. As a consequence, the writer on equity pleading might conceivably be justified, in a measure, if he were to ignore the details of the bill in its most highly developed form. But it is probable that more would be lost than gained by this process. By studying the bill in its most complicated shape the pleader is able to perceive more truly the relations and functions of all its different parts, and he is thereby the better enabled to judge of that which may be safely omitted as unnecessary and redundant. In other words he can better attain the greatest simplicity and terseness in his own pleadings when he has fully mastered the subject of the structure of the bill in all its aspects.

#### **§ 159. Caption—Title and Style of Cause.**

Every bill filed in an equity cause has its proper caption. The purpose of this is to identify the bill as belonging to the papers or

record in a particular suit. The caption consists chiefly of the title of the court and the style of the cause. The title of the court is usually written across the top of the first page or folio of the bill, thus, "In the Circuit Court of the United States for the Northern District of Alabama, Southern Division." The style of the cause is formed from the names of the plaintiff and defendant, their relation on the record being indicated by the familiar "*vs.*" or its equivalent "against." The style is usually written on the left hand side of the page under the title of the court, the name of the plaintiff being placed over that of the defendant. Following the style of the cause is placed a brace, and opposite the point of the brace to the right appear the words "in equity" or "equity side." The omission of the expression "in equity" from the caption is of no material consequence where the court is addressed as a circuit court "in chancery sitting." If the insertion of the words "in equity" should, in any case, be desirable, the court will direct the caption to be so amended informally.<sup>17</sup>

**§ 160. When Bill Should Not Be Entitled.**

In strict theory the caption seems not to be an integral part of the bill at all. The entitling of the bill is considered a clerical act merely, and it takes place in contemplation of law at the moment the bill is filed. Until the bill is filed there is no cause pending to have any title. Hence, it has been held that if, before a bill is actually filed, it is used as an affidavit at the hearing of an application for a preliminary injunction, the bill should not have a caption. But if one is put there it may be rejected as surplusage, the defect being of little moment.<sup>18</sup>

**§ 161. Necessary Allegation Cannot Be Inserted in Caption.**

Inasmuch as the title or caption of a bill is not considered as being any part of the body of the bill,<sup>19</sup> allegations that are required to be made in the bill cannot be inserted in the caption; or, if so inserted, they will be disregarded. For instance, where it is necessary that the bill should contain an averment of the citizenship of a party, this requirement cannot be met by describing such party in the caption as a citizen of a particular state.<sup>20</sup>

<sup>17</sup> *Sterrick v. Pugsley* (1874) 1 Flipp. 350, Fed. Cas. No. 13,379.

<sup>18</sup> *Sterrick v. Pugsley* (1874) 1 Flipp. 350, Fed. Cas. No. 13,379.

<sup>19</sup> *Spalding v. Dodge* (1888) 6 Mackey, 289; *Edney v. King* (1847) 39 N. C. (4 Ired. Eq.) 465.

<sup>20</sup> *Jackson v. Ashton* (1834) 3 Pet.

### § 162. Nine Formal Parts.

Coming to a consideration of the integral parts of the bill, we find that nine distinct parts or features have been generally recognized in equity pleading as the proper component elements of the bill. Of these nine distinct formal parts of the bill several are admitted to be dispensable.<sup>21</sup>

The nine formal parts of the bill, as commonly enumerated, are these: (1) the address to the judge or judges of the court of equity in which the suit is brought; (2) the introduction; (3) the stating part, or, as it is sometimes called, the premises; (4) the confederating clause; (5) the charging part of the bill; (6) the general jurisdiction clause; (7) the interrogatories, or interrogating part; (8) the prayer for relief; and (9) the prayer for process.

#### *Address of the Bill.*

### § 163. Address of Bill in English Chancery.

A bill in equity is a petition to the chancellor, or court exercising equity powers; and the address of the bill naturally contains the appropriate technical description of the court to which the application is made. It must therefore be varied to suit the particular organization of that court. In England the bill in equity was originally nothing more than a petition to the king, and it was at first directed to him. But as the custom of referring such petitions to the lord chancellor, or lord keeper, grew, it became usual to address the bill, in the first instance, to this official, as the keeper of the great seal. If there was no chancellor for the time being, then the bill was addressed to the lords commissioners for the custody of the seal, if such there were.<sup>22</sup> Of course occasions might arise where the bill could not properly be addressed to the lord chancellor or other person having custody of the seal, as for instance where the petition sought relief against him. Then too it sometimes happened that the seal was for the time being in the king's own hands. In all such cases the bill was appropriately addressed to the king himself.<sup>23</sup>

148, 8 L. ed. 898. In the caption a certain party was described as "W. E. Ashton, a citizen of the state of Pennsylvania." This was held to be insufficient, there being no proper allegation of citizenship in the body of the bill

<sup>21</sup> *Supervisors of Fulton County v. Mississippi, etc. R. Co.* (1859) 21 Ill. 367.

<sup>22</sup> 1 Dan. Ch. Pr. 411.

<sup>23</sup> 1 Smith Ch. Pr. (2d ed.) 83.

§ 164. Form of Address in State Courts of Equity.

In the several American states the form of the address varies, being adapted in each to the particular local organization of the court of equity or chancery. Where the chancery court still exists as an independent tribunal, the address may properly specify the chancellor by name with the addition of the designation of the court over which he presides.<sup>24</sup> But it is never necessary to address the chancellor by his name. The application is to the court and not to the individual.

§ 165. Address of Bill Filed in Federal Court.

Among federal tribunals the equity powers are at this time, and heretofore have been, almost exclusively reposed in the circuit courts. The particular judges who are to hold these courts at any time are very uncertain, since the circuit judge who usually presides in a particular circuit court may be busy somewhere else when the time to hold the court arrives. In consequence of this the duty of holding the court may devolve on a district judge or some other circuit judge or judges than the one accustomed to preside there. It results that a bill filed in a federal court should usually be addressed simply to the judge or judges of the circuit court without specifying the name of any particular judge. But this is really a matter of mere form, for if a bill is addressed to a particular judge by name, with the proper designation of his court, and another judge comes along to hold the court it is all right. It is considered that the following is a sufficient form for the address of a bill in a federal circuit court: "To the Honorable Judges of the Circuit Court of the United States for the Eastern District of New York." Or thus: "To the Honorable Judges of the Circuit Court of the United States for the Northern District of Alabama, Southern Division."<sup>25</sup> It is not bad form to add the words "sitting in equity" to the official designation of the court as above given, as this expression conduces to precision and imparts a certain neatness to the address. But it is not required by the equity rules. An address "To the Circuit Court for the Eastern District of Michigan, in chancery sitting," has been held to be sufficient.<sup>26</sup>

<sup>24</sup> Thus in New York the form of the address formerly was this: "To the Honorable James Kent, Chancellor of New York," Story Eq. Pl. § 28. In Tennessee the customary form of address now used is as follows: "To the Honorable Henry H. Cook, Chancellor of the Sixth Chancery Division of Tennessee holding the Chancery Court at Nashville." Or thus: "To the Honorable Chancellor holding the Chancery Court at Nashville, Davidson County, Tennessee." Gibson, Suits in Chan., 2d ed. § 155.

<sup>25</sup> See Equity Rule 20.

<sup>26</sup> *Starrick v. Pugsley* (1874) 1 Philp. 350, Fed. Cas. No. 13,379.

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*Introduction.***§ 166. Introductory Part of Bill.**

The introduction, or introductory clause of the bill, follows immediately after the address. Its chief purpose is to indicate the names of all the parties to the suit and their respective places of abode; also the capacity in which the plaintiff sues, if the suit is brought in the right of another. It is proper that the court should be apprised at the outset of the names and abodes of all the parties, in order that it, as well as others interested in the suit, may know upon whom and whither to go to enforce the payment of costs or to compel obedience to any orders made in the cause, or to process issued therein.

**§ 167. Form of Introduction.**

Under equity rule 20 the following is a sufficient introduction to a bill brought by a plaintiff in his own right against two defendants: "A B, a resident of Huntington, New York, and a citizen of the state of New York, brings this his bill against C D, a resident of Bayonne, New Jersey, and a citizen of the state of New Jersey, and E F, a resident of Louisville, Kentucky, and a citizen of the state of Kentucky." Following this comes the final clause of the introduction in words of such import as these: "And thereupon your orator complains and says."

Another form of introduction that is in very good taste indeed is this: "The bill of complaint of A B, a resident of Huntington, New York, and a citizen of New York, against C D, a resident of Bayonne, New Jersey, and a citizen of the state of New Jersey, and E F, a resident of Louisville, Kentucky, and a citizen of the state of Kentucky. The plaintiff respectfully shows to the court."<sup>27</sup>

If there are numerous parties plaintiff and defendant all the plaintiffs may be named successively with a statement of their respective places of abode, the recital being brought to an end by the word "plaintiffs." Under this list the word "against" or "*vs.*" may be centered; and below this will follow a similar catalogue of the various defendants with a statement of their respective places of abode, ending with the word "defendants." Thereupon follow the words, "The plaintiffs respectfully show unto the court."

An unknown person cannot be made a party to a bill by designating him by a fictitious name, such as John Doe.<sup>28</sup>

<sup>27</sup> See Gibson, *Suits in Chan.*, 2d ed. § 166.

<sup>28</sup> *Kentucky Silver Min. Co. v. Day* (1878) 2 Sawy. 468, Fed. Cas. No. 7,714.

**§ 168. Names of All Parties Must Be Set Out.**

Any departure from the rule requiring the names and places of abode of the parties to be stated in the introductory part of the bill may result in confusion and inconvenience; and pains should always be taken by the solicitor to acquire the information necessary to enable him to comply with the rule. If the names of all the several parties are not properly set out, the bill is objectionable.<sup>29</sup> Thus partners, who are made parties to a bill, are insufficiently named where they are indicated merely by the firm name, as "Day & Matlock." So the expression "*et al.*" following a particular name is not a sufficient designation of persons other than the one whose name is set out.<sup>30</sup>

**§ 169. Christian Name and Surname—Middle Name.**

Each individual should be designated by the Christian name and surname with the addition of the initial, at least, of the middle name, if there be one. The designation of a person by the initials of his Christian name coupled with the surname is an illustration of loose and careless practice which the supreme court has expressly disapproved.<sup>31</sup> Technically, the initials are no legal part of a name. The full Christian name and surname constitute the proper description of a party. The law apparently takes no notice of more than one Christian name, the middle name being treated as insignificant. But if the middle name or initial of the middle name is given, it should be correctly given.<sup>32</sup>

**§ 170. Name of Married Woman.**

By marriage a woman acquires the same surname as her husband, but when she is made a party to a suit she should be designated by her own baptismal Christian name coupled with the surname of her husband. Thus the wife of Leroy O. Jennings should be called Julia A. Jennings, if her baptismal name is Julia A. She should not be designated as Mrs. Leroy O. Jennings. The reason for this is that, by using the baptismal name of the wife, any danger of confusion is avoided. Besides, the discriminative abbreviation "Mrs." is really

<sup>29</sup> *United States v. Pratt etc. Co.* (1893) 18 Fed. 708. <sup>32</sup> See *Monroe Cattle Co. v. Becker* (1893) 147 U. S. 58, 37 L. ed. 77, and

<sup>30</sup> *Barth v. Makeover* (1868) 4 Biss. cases there cited. Compare *U. S. v. 206, Fed. Cas. No. 1,069; Lyman v. Winter* (1876) 13 Blatchf. 276, *Milton* (1872) 44 Cal. 630.

<sup>31</sup> *Walton v. Marietta Chair Co.* (1896) 157 U. S. 347, 39 L. ed. 727,

no part of the name and without it there would be nothing to distinguish her.<sup>33</sup>

### § 171. Statement of Abode of Parties.

The failure to set out the places of abode of all the parties is seemingly a less grave offense against form than is the failure to give their names; nevertheless if a bill is defective in this respect objection may be taken. Though confessedly a demurrer supplies one means of pointing out such a defect, the courts are inclined to hold that the defect is so far venial that the bill should not be dismissed on account of it, and hence the demurrer is considered to be unnecessary. The more appropriate proceeding is to move to strike the bill from the files for the informality. The court will always allow the bill to be amended on the spot so as to cure the trouble, if the plaintiff wishes to amend.<sup>34</sup>

### § 172. Mistake as to Name of Party.

A misnomer of the defendant in the bill affords no ground for dismissing as to that defendant after he is served and answers under the incorrect name without pleading the misnomer in abatement, or otherwise making timely objection on this ground. For instance, a corporation was sued as the Cunard Steamship Company. It was served with process in that name and answered in the same manner, thereby admitting its name and character. Subsequently this defendant by petition represented that its real name was British and North American Royal Mail Steam-Packet Co., and it prayed that it might be dismissed and the service vacated. It was held that this afforded no ground to discharge the company.<sup>35</sup>

### § 173. Plaintiff Suing in Representative Capacity.

If a suit is brought by the plaintiff in a representative capacity he should be so described as to indicate the particular capacity and right in which he sues; and if the plaintiff sues in more than one capacity his several capacities should be distinguished from each other,<sup>36</sup> as where one person sues individually and also as guardian or

<sup>33</sup> See *Elberson v. Richards* (1880) 42 N. J. L. 70; *Schmidt v. Thomas* (1889) 53 Ill. App. 109.

<sup>34</sup> *Harvey v. Richmond, etc. R. Co.* (1894) 64 Fed. 19; *Wright v. Skinner* (1906) 136 Fed. 694.

<sup>35</sup> *Bate Refrigerating Co. v. Gillett*, (1887) 31 Fed. 809, 815. *Reversed on different ground* (1890) 129 U. S. 151.

<sup>36</sup> 32 L. ed. 645, 9 Sup. Ct. 225.  
<sup>37</sup> *Taylor v. Henham* (1847) 5 How. 277, 12 L. ed. 130.

next friend of another, or as executor and guardian, or as next friend and administrator. There seems to be no positive requirement that the designation of the capacity in which a party sues or is sued shall be stated in the introductory part of the bill rather than in the stating part, but it is nevertheless convenient and proper to put it there; and such is the usual practice. A bill filed by John Smith as administrator of the estate of William Smith would not be in good form if, in the introductory part of the bill, the suit purported to be brought merely by John Smith as plaintiff.

*Stating, or Narrative, Part of Bill.*

*a. Sufficiency of Allegations in General.*

**§ 174. Statement of Equity of Bill.**

The stating, or narrative, part of the bill, or the part otherwise known as the premises, embraces the real substance of the suit. Here should be set out all the essential facts on which the plaintiff relies as a ground of relief. All the skill of the best trained legal faculties can well be brought into play in framing this part of the bill. The general object to be kept in mind is the clear and effective presentation of the facts that it is necessary for the plaintiff to prove in order to make out his case.

To frame a bill properly is more than a mere problem of expression: it requires not only a knowledge of the facts on which the cause of action is based, but a clear perception of the legal principles applicable to those facts. The infallible mark of the expert draughtsman is found in the ability to present in his bill a true and vivid picture of the transaction that is the basis of the suit, as the same is seen by the eye of an expert and from the point of view of his client. The skilful statement of a cause in the bill constitutes an auspicious beginning of the suit. The first impression of a case obtained by the court is derived from the reading of the bill, and it is of no little moment that this first impression should be a favorable one. If the facts are rightly marshaled the trained mind of the judge will at once perceive the true bearing of those facts, though the legal principles are not explicitly stated; and if the cause has a just basis, the mere statement of the case is a strong argument in favor of the plaintiff's contention. On the other hand, a loose and jumbled statement, the indiscriminate mixing of relevant and irrelevant facts, is calculated to obscure the real issue and is in every way prejudicial to the plaintiff's cause. It is characteristic of the meritorious cause

to be capable of intelligible statement, and the fact that a cause is not so stated is persuasive either that merit is wanting or that the draughtsman is lacking in skill. The lawyer who embarks in any serious litigation is likely to find his path beset with many obstacles, even though his client's cause is just. It therefore behooves him to see that there are no impediments of his own creation. The allegations of a bill must be such as to enable the court to determine what questions are presented for decision. If this is not done the bill is demurrable for want of equity.<sup>37</sup> Vague averments on information and belief and mere deductions of the pleader are not accepted in equity pleading as a substitute for facts.<sup>38</sup>

Lack of certainty in the allegations of the bill, even though not so vital as of itself to preclude relief, is a circumstance to be considered with other features of the bill as persuasive of a want of equity.<sup>39</sup>

#### § 175. Opinions and Conclusions of Law.

The statement of mere matter of opinion in a bill, unsupported by specific facts sufficient to show that the opinion in question is well grounded, is bad pleading.<sup>40</sup> The same is generally true of averments that embody no more than mere legal conclusions. Such allegations are often idle and superfluous, and they render the bill subject to demurrer. If not stricken out, they may sometimes seriously prejudice the plaintiff's case; for, if the plaintiff alleges that certain legal conclusions are the proper ones to be drawn from the evidence, and he bases his prayer for relief on that theory and the proof is taken on the theory of the case thus propounded by the plaintiff, he may be estopped at the hearing from getting relief upon a different theory of the case. This will happen wherever it appears that the defendant has been misled as to the use to which the evidence was intended to be put.<sup>41</sup>

While it is a general rule of equity pleading that the bill must not consist of mere conclusions of law, it does not follow that the statement of legal conclusions is always to be excluded from the bill. In fact it is always proper in drawing a bill to state just enough legal

<sup>37</sup> *Savage v. Worsham* (1892) 104 Fed. 18.

<sup>38</sup> *Jahn v. Champagne Lumber Co.* (1908) 157 Fed. 407, 417.

<sup>39</sup> *Taylor v. Holmes* (1882) 14 Fed. 513.

<sup>40</sup> *Einstein v. Schnebly* (1898) 89 Fed. 540.

<sup>41</sup> "As the defendant is entitled to know what facts the plaintiff intends to prove, in order that he may not be taken by surprise, so he is entitled to know, for the same reason, what use the plaintiff intends to make of his facts."

*Langdell Eq. Pl. § 61.*

conclusions to show the true theory underlying plaintiff's suit and to indicate the aspect in which the proof is to be interpreted.<sup>42</sup> Indeed much of the art of good pleading is manifest in the skill with which the draughtsman of the bill marshals his facts in a terse and lucid manner and then exhibits the theory of his case by the proper interpretation of those facts in the light of equitable principles. The narrative of the facts should always be so contrived as to bring out the true legal bearing of those facts. In other words, the theory underlying the case should be made plain and intelligible. The theory of the case should be presented with sufficient allegations of fact to give basis and point to the charges. If the allegations develop too much theory, the bill will be open to the criticism of stating mere conclusions of law or of being too abstract. If the facts are developed with needless fullness, the bill is subject to criticism for merely stating matters of evidence. The well-drawn bill preserves a just and proper balance between the two elements.

Badly pleaded conclusions of law will not vitiate a bill which, apart from such badly pleaded matter, contains sufficient averments of fact to support the equity of the bill.<sup>43</sup>

#### § 176. Material Facts Must Be Alleged.

The general principle in accordance with which every bill must be drawn is that no material facts essential to the plaintiff's cause can be proved in support of the bill unless those facts have been duly alleged by him. This principle has been repeated time and again by the courts and text-writers with much variety of expression. Thus in one case it was said by Clifford, J., at circuit: "Facts essential to maintain the suit and obtain relief must be stated in the bill, otherwise the defect will be fatal, for no facts are properly in issue unless charged in the bill; and of course proofs are not admissible to establish what is not alleged, nor can relief be granted for matters not charged, even though they may be apparent from other parts of the pleadings and evidence, the rule being that the court pronounces the decree *secundum allegata et probata*."<sup>44</sup>

<sup>42</sup> *Allen v. O'Donald* (1885) 23 Fed. 576. Where a writing is indispensable to a valid contract, a pleading of a contract which does not affirmatively disclose that it was made by parol is a pleading of a written agreement. *Rogers v. Penobscot Mining Co.* (C. C. A.; 1907) 83 C. C. A. 380, 154 Fed. 606.

<sup>43</sup> *Berwind v. Canadian Pac. Ry. Co.* (1899) 98 Fed. 158.

<sup>44</sup> *Bradley v. Converse* (1876) 4 Cliff. 366, Fed. Cas. No. 1,775. See *Voorhees v. Bonesteel* (1872) 16 Wall. 16, 21 L. ed. 268; *Warren v. Van Brunt* (1873) 19 Wall. 654, 22 L. ed. 222.

### § 177. Cause Must Be Put in Issue.

In another case the same principle was put thus by the court: "Every bill must contain in itself sufficient matters of fact, *per se*, to maintain the case of the plaintiff, so that the same may be put in issue by the answer and established by the proofs. The proofs must be according to the allegations of the parties; and if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground for its decision: for the pleadings do not put them in contestation."<sup>45</sup>

### § 178. Relief Determined by Scope of Plaintiff's Allegations.

It thus appears that the relief grantable in any suit in equity must be determined by the scope and allegations of the bill. Even an admission in an answer cannot be the basis of relief unless facts are stated in the bill that make the admission relevant.<sup>46</sup> A court will refuse to grant relief unless the substantial ground work of the case on which relief is sought is distinctly alleged in the bill. Thus where the bill seeks relief in respect of rights growing out of a patent, it must clearly appear that the title to the letters patent is vested in the plaintiff. Such an objection can be made for the first time at the hearing.<sup>47</sup>

A variance between the allegations and the proof on a point not material to the equity of the plaintiff's bill is not fatal.<sup>48</sup>

### § 179. Plaintiff Not Required to State Mere Matters of Evidence.

Though the principle of pleading considered above is absolutely fundamental and invariable, its true import may be very easily misconceived. Indeed as the rule is actually formulated it is somewhat misleading. When it is said that all the facts that the plaintiff needs to prove must be alleged in the bill, issuable facts are meant, not the evidentiary facts. As a matter of mere pleading, the plaintiff is never required to set out the evidence on which he expects to rely at the hearing. If this were required the bill would truly become a tedious and unending narrative of occurrences, conversations, surmises, and gossip. It may very well be that in many cases what we

<sup>45</sup> *Harrison v. Nixon* (1835) 9 Pet. 483, 503, 9 L. ed. 201, 208. See also *Jackson v. Ashton* (1837) 11 Pet. 229, 9 L. ed. 698.  
<sup>46</sup> *Barth v. Clise* (1870) 12 Wall. 403, 20 L. ed. 394; *Phelps v. Elliott* (1888) 35 L. ed. 461; *Foster v. Goddard* (1861) 1 Black, 506, 17 L. ed. 228.  
<sup>47</sup> *Pelham v. Edelmeyer* (1893) 15 Fed. 262.  
<sup>48</sup> *McCay v. Lamar* (1892) 12 Fed. 367.

have called the issuable facts correspond with the evidentiary facts, but it is not always so. It appears that no definite rule can safely be formulated in regard to this matter, and it must be left largely to the legal instinct and experience of the practitioner to discriminate rightly here. One rule is that if the issuable facts are set forth with such certainty and precision as to apprise the defendant of the precise case he is required to meet, this is sufficient, although the allegations are general and might have been more extended.<sup>49</sup> As a general rule it is unnecessary to go into minute circumstances. What is called a general certainty is usually sufficient, though in a few situations the same certainty is required in equity pleadings as in declarations at law.

1. *St. Louis v. Knapp* (1881) 104 U. S. 658, 26 L. ed. 883: The city of St. Louis filed a bill to enjoin the defendant, a lumber company, from constructing a run-way intended for hauling logs from the river to its mills and from driving piles in the bed of the river. The proposed run-way was within ground that, by city ordinance, had been opened as a wharf. The bill contained a general charge that the driving of the piles in the bed of the river and the construction of the run-way would cause a diversion of the stream from its natural course and would throw it east of its natural location, thus creating in front of the city's wharf a deposit of mud and sediment. This, it was alleged, would render it impossible for boats and vessels engaged in the navigation of the Mississippi to approach or land at the improved wharf north and south of defendant's premises. It was held that the bill was sufficiently precise and distinct, and stated a *prima facie* cause of action.

2. *Western Union Tel. Co. v. Los Angeles Electric Co.* (1896) 76 Fed. 178: A bill was filed by a telegraph company to enjoin an electric light and power company from stringing its wires so close to plaintiff's wires as to cause interference with the proper working of plaintiff's wires, the alleged interference being due to the induction of electrical currents. The bill alleged that the defendant's wires were strung directly under the plaintiff's wires and in many places so near as to interfere with the working of plaintiff's wires in consequence of the stronger current sent over the defendant's wires. It was held that this was sufficiently explicit in point of fact and that it was not necessary to state the distance between the wires, that being more properly matter of proof.<sup>50</sup>

<sup>49</sup> *Einstein v. Schnebly* (1896) 89 Fed. 549; *St. Louis v. Knapp* (1881) 104 U. S. 658, 26 L. ed. 883.

<sup>50</sup> In a bill brought to set aside a sale, a statement was adjudged to be lacking in certainty which averred that the sale was simulated and, if not simulated, fraudulent. The point in the objection was that a simulated sale is a sham sale while a fraudulent sale is a real but defective sale. The bill might have alleged that the sale was a fraudulent simulation and then, on discovery, the bill could have been amended, if necessary. The ruling appears to be somewhat hypercritical. It was admitted that the averment in question was not lacking in consistency. *Socola v. Grant* (1883) 15 Fed. 487.



**§ 180. Allegation of Facts Best Known to Defendant.**

A bill is not objectionable for lack of certainty in its allegations where that uncertainty exists in respect of matters concerning which discovery is sought or concerning which the defendants have fuller knowledge than the plaintiff.<sup>61</sup>

**§ 181. Admissions of Answer as Curing Defective Allegations.**

If the bill shows on its face a cause of equitable jurisdiction, any merely formal defect in the statement of the case, or lack of certainty in the allegations, will be cured by the admissions of the answer.

*Covender v. Covender* (1885) 114 U. S. 464, 29 L. ed. 212: A bill filed to remove an unfaithful trustee. The trust had been created by a will and its terms were set out generally by the plaintiff. The defendant answered under oath and set out the provisions of the will with apparent particularity and fullness. It was held that any insufficiency or lack of certainty in the allegations of the bill concerning the trust was rendered immaterial by the statements of the answer. Furthermore, it was held that the admissions of the answer were such as to justify dispensing with a copy of the will.

It was said: "A defendant to a bill in equity, who states in his answer under oath the provisions of a writing, which is presumed to be in his possession, cannot complain that the court acted upon his admission. The court might in its discretion have refused to interpret the writing without its production. But having acted upon the presumption that the defendant in his answer stated truly the contents of the writing, the latter cannot, on the ground that the writing itself was not put in evidence, ask a reversal of the decree. . . . It does not lie in the mouth of a defendant in equity to complain that the court assumed his answer made under oath to be true and decreed accordingly."

**§ 182. Insufficient Facts and Uncertainty of Pleading Distinguished.**

In considering the sufficiency of the allegations of the bill, it is well to distinguish between insufficient facts and an insufficient certainty in the statement of facts. A bill that states insufficient facts is wholly bad and subject to a general demurrer; such a bill will not support a decree. But where the bill shows sufficient facts, though inaccurately or ambiguously stated, it will support a decree and is good as against a general demurrer. But a special demurrer pointing out the particular defect of form might well lie. Thus if a bill is objectionable in respect of stating an essential fact by implication only and not in express terms as it should be alleged, a general demurrer will not lie.

<sup>61</sup> *Dunham v. Eaton etc. R. Co.* (1861) 1 Bond, 492, Fed. Cas. No. 4,150.

*Investor Pub. Co. v. Dobinson* (1896) 72 Fed. 603: A bill was filed to enjoin the publication of a trade journal under name of "The Investor" on the ground of unfair competition and unlawful interference with the good will of plaintiff's paper published under a similar name. It was material and necessary in this suit that there should be in the bill an allegation to the effect that the use by the defendants of the trade name in question caused, or would cause, the public to confuse defendant's paper with that of the plaintiff. Instead of alleging this fact directly the bill merely charged it inferentially and by implication, thus: "Your orator charges that the defendants by adopting the name of 'The Investor' for such paper have diverted trade belonging to your orator and caused confusion," etc. It was held that this was good as against a general demurrer.

### § 183. Set Formulas Unnecessary in Equity Pleading.

The use of particular forms of expression is never necessary in equity pleadings. The facts on which the equity of the case rests may be set out in any terms that the draughtsman may select as proper to convey his meaning. Equity pleading is not based on any hard and fast rules of form; and if the main object for which the pleading is framed be attained, the pleading will be held good. The chancery court has constantly maintained the principle of flexibility as regards the forms of expression used in equity pleadings, and it has always tolerated a certain degree of looseness in its rules in this respect. The rules of pleading in equity have consequently never been so strict as those that prevail or formerly prevailed in the courts of common law.

### § 184. When Common-Law Forms of Pleading Proper in Equity.

Yet while this principle is fully recognized it does not follow that accuracy, certainty, and precision are to be neglected. Hence we find it recommended by Mr. Daniell that the equity pleader should adhere to the rules of common-law pleading whenever those rules are applicable to the case he is called on to present to the court. The forms of description and allegation adopted as proper in courts of law have been debated and settled upon solemn deliberation. Hence by usage and decision they have become with the profession an accepted and proper vehicle for conveying clear and distinct notions of the subjects with which they are connected. It is therefore proper that in equity also the same form should be used where the pleader desires to convey the same meaning. To use these forms in appropriate cases is conducive both to precision and to brevity. It may be observed, however, that this advice from the learned author is chiefly of value in connection with the setting forth of the nature and

extent of estates in real property.<sup>53</sup> We may add, furthermore, that as the science of special pleading becomes obsolete, equity pleaders cannot be expected to resort to that branch of learning for enlightenment as to the proper mode of stating facts requisite to sustain a bill. Whatever we learn on these questions must doubtless be worked out anew in the courts of equity, as the minds of pleaders and judges are brought from time to time into contact with the various problems.

### § 185. How Defect Resulting from Uncertainty May Be Reached.

Where the bill is found to be defective in respect to the certainty of its allegations, the proper step for the defendant to take is to demur. A motion to require the plaintiff to make the allegations of the bill more certain will not be entertained. Such a motion is unknown to equity procedure.<sup>54</sup> The idea that such a motion might be proper was evidently imported from the practice of the code states.

#### *b. Sufficiency of Allegations in Specific Cases.*

### § 186. Certainty Required in Allegations of Fraud.

An exceptionally high degree of certainty in the allegations of the bill is required in those cases where the cause of action is based on fraud. The rule here is that affirmative relief will never be granted in equity on the ground of fraud, unless it be made a distinct allegation in the bill and is thus put in issue by the plaintiff's pleading.<sup>54</sup> Furthermore it is settled that general averments of fraud

<sup>53</sup> Mr. Daniell gives the following illustrations of legal forms of common-law pleading advisable to be used in equity: "If a man intends to allege a title in himself to the inheritance or freehold of lands or tenements in possession, he ought regularly to say that he is *seised*; or if he allege possession of a term of years, or other chattel real, that he is *possessed*, etc." As regards the use of such expressions in equity pleadings he adds: "It is indeed the general practice in all well-drawn pleadings to insert them, although they are frequently accompanied with other words, which are sometimes added by way of enlarging their meaning and of extending them to other than mere legal estates, or for the purpose of laying the ground for interrogatories to be put to the defendant in a subsequent part of the bill. Thus in stating a seisin in fee, the ordinary legal form is generally adhered to, with the addition of these words or otherwise well entitled unto, etc." 1 Dan. Ch. Pr. 467.

He also observes that it is a rule of pleading at common law that the nature of a conveyance or alienation should be set forth according to its legal effect, rather than its form of words. Therefore, says he, in pleading a conveyance for life with livery of seisin, the proper form in equity is to allege it as a demise for life, for such is its effect in proper legal description. So a conveyance in tail is pleaded as a gift in tail, and a conveyance of the fee with livery is described by the word *enfeoffed*. 1 Dan. Ch. Pr. 469.

<sup>54</sup> *Einstein v. Schmely* (1898) 89 Fed. 540.

<sup>55</sup> *Noonan v. Lee* (1892) 2 Black, 506, 17 L. ed. 281; *Moore v. Greene* (1886)

are wholly inadequate and insufficient. Thus in a bill attacking the reorganization of two railroad companies, an allegation in general terms that the reorganization was merely a fraudulent scheme fraudulently designed by its promoters is of no value as an averment of fraud, and has been characterized as "a mere *brutum fulmen*."<sup>56</sup> But in a bill by a purchaser of land to rescind the sale as having been procured by fraud, a statement that the land was falsely represented by the vendor to be free from incumbrance, whereas in fact it was subject to a judgment lien for several hundred dollars, sufficiently shows both fraud and the consequent damage.<sup>56</sup>

### § 187. Specific Facts Indicative of Fraud Must Be Shown.

In making allegations of fraud, good pleading requires that the plaintiff should state the inculpatory facts in order that they may carry their own conviction of fraud and in order that the wrong-doing may thereby be made more clearly to appear. Where this is done, less need is felt to indulge in characterizing the conduct in question as fraudulent. And at any rate a court will not sustain a bill on mere denunciatory statements of the plaintiff's suspicions or beliefs. If the facts are not to be ascertained by diligence, because of some obstruction, or if the evidence is in the possession of the other side, this should be made to appear with technical averments showing the necessity for discovery, where such is wanted.<sup>57</sup>

*United States v. Atherton* (1880) 102 U. S. 372, 26 L. ed. 213: A bill filed by the United States to annul a land patent on the ground of fraud contained only a general allegation that certain persons, not named, conspired together and by false and fraudulent representations and by the suppression of facts imposed on the government officers connected with the land office and fraudulently procured the patent to be issued. This was held to be insufficient. The bill should not only have named the parties who committed the fraud and the particular persons or officers imposed on, but also should have stated the means by which the fraud was accomplished.

### § 188. Minute Details Need Not Be Alleged.

While it is thus true that charges of fraud must be specific, this does not mean that all the details and circumstances of the trans-

19 How. 69, 15 L. ed. 533; *Beaubien v. C. C.* 206; *Voorhees v. Bonesteel* (1872) 23 How. 190, 16 L. ed. 16 Wall. 16, 21 L. ed. 268.  
484; *Magniac v. Thomson* (1853) 15 How. 281, 14 L. ed. 696; *Magniac v. Thomson* (1852) 2 Wall. Jr. 209; *Eyre v. Potter* (1853) 15 How. 42, 14 L. ed. 692; *Fisher v. Boody* (1852) 1 Curt. Fed. 738.  
<sup>56</sup> *Cella v. Brown* (1906; C. C. A.) 75 C. C. A. 606, 144 Fed. 754.  
<sup>57</sup> *Linn v. Green* (1883) 17 Fed. 407.  
<sup>58</sup> *Lafayette Co. v. Neely* (1884) 21

action should be set forth with particularity. It is sufficient if the allegation of fraud is explicitly and distinctly made and the mode in which the fraud was accomplished is pointed out.

*De Hierapolis v. Lawrence* (1902) 115 Fed. 761: A creditors' bill sought to reach property which, it was alleged, had been fraudulently conveyed away by the debtor. In charging the fraud, it was stated that the conveyance in question was without consideration and was null and void, and that it was made by the grantor and accepted by the grantee with the intent to hinder, delay, and defraud the creditors of the grantor and to place the property beyond their reach. It was held that this was a sufficient averment of fraud.

### § 189. Charges of Fraud Prejudicial to Plaintiff if Unsupported.

As a rule a bill is much prejudiced by reckless and extravagant charges of fraud in general terms. In one case the circuit court of appeals, on examining a record, found some matter that under ordinary conditions might have obtained some consideration for the plaintiff. But the bill was dismissed because the wholesale charges of fraud were not proved.<sup>55</sup> The reason for this attitude of the courts is doubtless found in the fact that a charge of fraud deeply affects the character and standing of the defendant. If such a charge is false, it would constitute a libel but for that liberty which is allowed to plaintiffs in stating their grievances in legal pleadings. Consequently if a bill charges fraud as a ground of relief, the court will not readily grant relief on that ground unless the fraud com-

<sup>55</sup> *Brown v. Davis* (1894) 10 C. C. A. 532, 62 Fed. 519, 523. Said the court: "If this were a case in which the complainant had come into court with a fair presentation of the facts, evincing a disposition to assert his equities without injury to others, and had presented the matter of estoppel upon the real facts of the case as above stated, we are inclined to the opinion that he would not have been turned out of court without consideration of his right to assert the estoppel in question. Such a case, however, is not the one in hand, but rather a case where the complainant, by his reckless charges of fraud, and conspiracy to cheat, swindle, and defraud, against Harris Masterson and other parties against whom he had no equity whatever, impugning their personal and professional integrity, and following the same up with reckless evidence in support thereof, which the slightest investigation would have shown him to be wholly unfounded, presents himself as one more inclined to ask equity than to do equity, and one not in court with such clean hands as entitle him to demand of the court to consider favorably to him the partial equity suggested, even if it were otherwise well founded." In *Smith v. Babcock* (1846) 2 Woodb. & M. 246, Fed. Cas. No. 13,009, a bill was filed to rescind a sale of land. The ground set forth was that of fraud. The proof showed a state of facts that would have justified relief on the ground of gross mistake. Woodbury, Circuit Judge, was inclined to the opinion that relief might have been granted on this ground, the idea being that gross error is in a measure akin to the defense of fraud, only of lower degree. The point was not necessary to the decision. Compare *Daniel v. Mitchell* (1822) Fed. Cas. No. 3,562; *Mason v. Crosby* (1846) Fed. Cas. No. 9,234.

plained of is charged in proper terms; nor will the court in such case allow the plaintiff to maintain his bill on some different ground that might otherwise appear to be sufficient. To follow a different course would often result in injustice to the defendant.

### § 190. Allegations of Recent Discovery of Fraud.

In a bill to obtain relief from a concealed and recently discovered fraud, it is necessary that there should be distinct averments as to the time of the discovery of the fraud, how the knowledge was obtained, why it was not obtained earlier, and as to the diligence previously used in the investigation of the fraudulent transaction, so that the court can discover from the bill itself whether the plaintiff has not lost his rights by laches. A general averment to the effect that the plaintiff was ignorant of the fraud and that the defendant concealed it is not enough.<sup>59</sup> On the same principle, a general allegation of ignorance at one time and of knowledge at another is of no avail. If the plaintiff has made any particular discovery, he should show when it was made, what it was, how it was made, and why it was not made sooner.<sup>60</sup>

*Hardt v. Heidweyer* (1894) 152 U. S. 547, 38 L. ed. 548: A bill was brought for the purpose of compelling certain creditors, who, it was alleged, had been fraudulently preferred, to account to other general creditors for property that came into their hands by virtue of the alleged fraudulent transactions. The bill was brought five years after the transfers were made. The suit was dismissed on demurrer for insufficiency of the bill. Said Mr. Justice Brewer: "It is apparent that this bill must be held deficient in not showing how knowledge of the wrongs complained of was obtained by the plaintiffs. It is alleged that they were ignorant, and now have knowledge; and that they acquired such knowledge within a month prior to bringing the suit; but how they acquired it, and why they did not have the same means of ascertaining the facts before, is not disclosed."

### § 191. Averments Based on Rumor.

Where the stating part of the bill contains allegations of concealment, misrepresentation, and fraud sufficient to sustain the bill,

<sup>59</sup> *Hubbard v. Manhattan Trust Co.* 36 L. ed. 134, 145; *Twin-Lick Oil Co. v.* (1898) 30 C. C. A. 520, 87 Fed. 51; *Marbury* (1875) 91 U. S. 587, 23 L. ed. *Stearns v. Page* (1849) 7 How. 819, 12 328; *Fisher v. Boody* (1852) 1 Curt. C. L. ed. 928, (1840) 1 Story 204, Fed. Cas. C. 206; *Carr v. Hilton* (1853) 1 Curt. No. 13,339; *Wood v. Carpenter* (1879) C. C. 390; *Moore v. Greene* (1854) 2 101 U. S. 135, 25 L. ed. 907; *Felix v. Curt. C. C.* 202; *Credit Co. v. Arkansas Patrick* (1892) 145 U. S. 317, 36 L. ed. etc. B. Co. (1892) 15 Fed. 46; *Badger v. Badger* (1864) 2 Wall. 87, 17 L. ed. 719, 12 Sup. Ct. 962; *Goddard v. Kim-mell* (1878) 99 U. S. 201, 211, 25 L. ed. 836; *Harwood v. Railroad Co.* (1872) 17 431, 434; *Landsdale v. Smith* (1892) Wall. 78, 21 L. ed. 558.  
106 U. S. 391, 27 L. ed. 219; *Hammond* <sup>60</sup> *Wood v. Carpenter* (1879) 101 U. v. *Hopkins* (1892) 143 U. S. 224, 251, 36 L. ed. 909.

the strength of such averments will not be lessened by reason of the fact that in another part of the bill, where the plaintiff charges matter in avoidance of laches, it is shown that the plaintiff's case is based on facts that lately came to him by rumor.<sup>61</sup>

### § 192. Certainty in Allegations of Negligence and Misconduct.

In suits where it is sought to fix liability on the defendant for negligence, misconduct, or dereliction of duty, the charges should be made specific, and the allegations of the bill should have a degree of certainty little short of that required in cases of fraud. Thus a bill filed against the directors of a defunct corporation to recover losses sustained through their negligence should state the dates of the losses and the dates of the acts or omissions causing those losses, to the end that each of the defendants may be apprised of the particular losses for which he may be held. A bill that does not contain such statements is lacking in certainty.<sup>62</sup> An allegation to the effect that the directors utterly failed and neglected to perform their duties and, for a considerable period, failed to give any adequate attention to the bank and allowed the bank to be improvidently and recklessly managed, is too general, especially when not connected with any particular occasion of damage.

*Allen v. Luke* (1906) 141 Fed. 624, 696: Speaking on the point of the certainty of pleading required in cases of this kind, Lowell, Circuit Judge, said: "This particularization is required by substantial justice, as well as by precedent. The complainant believes that the bank has suffered loss through the negligence and misconduct of the defendants, its directors, and so believing has brought suit against them. But in order that the defendants may prepare their defense, in order that they may by demurrer raise questions of law without the expense of a trial of the facts, they are entitled to know the kind of alleged negligence upon which the complainant will rely. It is not sufficient that A, thinking he has a grievance against B, should state merely that he has a grievance and leave its nature to appear at the trial. Justice to the defendant and an economical ordering of judicial procedure require something more. Actionable negligence is not a habit of mind, but action or inaction contrary to the practice of reasonable men under the circumstances. The complainant must specify the action or inaction relied on. Here, for example, does he rely upon the failure of a given defendant to attend a particular meeting of the board of directors, or upon his joining in a particular vote which due care would have shown him to be improper, or upon specific intentional misconduct? These, or other kinds of action and inaction may be the concrete facts which the complainant has in mind when he charges negligence. The defendants are entitled to a concrete statement."

<sup>61</sup> *Curran v. Campton* (1898) 29 C. C. A. 28, 95 Fed. 67.      <sup>62</sup> *Price v. Coleman* (1884) 21 Fed. 357.

### § 193. Allegations of Bill Seeking Unusual or Extraordinary Relief.

Where the right of a plaintiff to maintain a bill is an extraordinary one or the proceeding is out of the usual course, the bill will not be sustained on demurrer, unless the allegations are full, precise, and entirely clear in regard to the fact that is at the essential basis of the suit. Especially will this rule be enforced where an equity court of co-ordinate jurisdiction has already dismissed, for want of equity, a bill based on the same transaction.<sup>63</sup>

### § 194. Allegations of Bill to Reform Sealed Instrument.

The allegations of a bill filed to reform a formal release under seal must be precise and distinct, and whatever is within the plaintiff's knowledge should be alleged positively. A solemn instrument executed by competent parties cognizant of their rights is not lightly to be added to or set aside. A case founded on uncertain allegations or supported by doubtful proof is not sufficient.<sup>64</sup>

### § 195. Allegations in Bill to Quiet Title to Land.

In regard to the certainty with which the plaintiff should set forth his interest or estate in land, the title to which he wishes quieted, Deady, J., once said: "Generally, I think it will be found sufficient for the plaintiff to allege his possession and interest, or estate, in the land, as that he is the owner thereof in fee, for life, or for years; and that he claims the same by a regular chain of conveyances from some recognized and undisputed source of title, as the United States, or its donee, . . . without setting out such conveyances or stating them in detail. But when there is reason to believe that the rightfulness of the defendant's claim depends on the validity or legal effect of some link or links in the conveyances under which the plaintiff claims title, it is very convenient, if not necessary, that the statement of the plaintiff's case should contain the facts fully and in detail at that point in the chain of his title where it conflicts with the claim of the defendant."<sup>65</sup>

### § 196. Allegations in Bill Based on Personal and Intangible Rights.

If the suit does not involve the title to property and is not based on a property right but on some other right of a personal and less

<sup>63</sup> Bishop v. York (1903) 124 Fed. 959.

<sup>64</sup> Goldsmith v. Gilliland (1895) 22 Fed. 365, 368.

<sup>65</sup> Willard v. Davis (1903) 122 Fed. 263.



tangible nature, such right, whatever it be, must be sufficiently alleged, the purpose of the bill being to show wherein the plaintiff is injured and aggrieved.<sup>66</sup>

#### § 197. Allegation of Consideration in Suit Based on Contract.

In a suit to compel discovery in respect to matters done under a purported contract, discovery will not be enforced where the contract in question shows on its face a want of consideration. Nor is the bill aided by a bare allegation that the contract was "for a good and valuable consideration." The consideration should be set out.<sup>67</sup>

#### § 198. Allegations in Bill to Declare Trust.

In a suit to declare and enforce a trust the facts upon which the alleged trust is asserted, whether by reason of an express declaration or by circumstances, should be set forth.<sup>68</sup> Thus in a bill to enforce a trust against a defendant who is alleged to hold the legal title as trustee for the plaintiff, the facts should be stated which constitute him a trustee.<sup>69</sup>

#### § 199. Property Must Be Described.

To support equitable jurisdiction on the ground of following property wrongfully converted by a tortfeasor into its proceeds, the bill must, in case discovery is not sought, identify the particular property into which the property originally taken has been converted so that it may be followed as a trust.<sup>70</sup>

#### § 200. Allegations in Patent Suits.

In a bill to restrain the infringement of a patent, it is necessary to allege that the invention had not been patented or described in any printed publication before the date of the invention;<sup>71</sup> also that the plaintiff (being the patentee) was the original inventor.<sup>72</sup> Again,

<sup>66</sup> Gibson, *Suits in Chan.* (2d ed.) 139. 899; *Overman Co. v. Elliott Co.* (C. C.; 1892) 49 Fed. 859; *Goebel v. American Co.* (C. C.; 1893) 55 Fed. 825; *American Ore etc. Co. v. Atlas Cement Co.* (1901) 110 Fed. 53.

<sup>67</sup> *Grenville-Murray v. Earl of Clarendon* (1869) L. R. 9 Eq. 11; *Jackson v. Railway Co.* (1848) 18 L. J. Ch. N. S. 91. *Hanlon v. Primrose* (C. C.; 1893) 56 Fed. 600; *Hutton v. Star Co.* (C. C.; 1894) 60 Fed. 747; *Diamond Match Co. v. Ohio Co.* (C. C.; 1897) 80 Fed. 117; *Rubber Co. v. Davie* (C. C.; 1900) 100 Fed. 85; *American Graphophone Co. v. National Phonograph Co.* (1904) 127 Fed. 349.

<sup>68</sup> *Metropolitan Trust Co. v. Columbus, etc. R. Co.* (1899) 93 Fed. 689. <sup>71</sup> *United States v. Bitter Root Co.* (1906) 200 U. S. 451, 474, 50 L. ed. 550, 561.

<sup>69</sup> *Sullivan v. Redfield* (1825) Fed. 561. <sup>72</sup> *Coop v. Institute* (1891) 47 Fed. Cas. No. 13,697; *Young v. Lippman*

it is essential in such a bill that there should be an averment that the title to the patent is in the plaintiff;<sup>73</sup> and it is necessary to set forth that the statutory requirement as to two years' public use has been complied with.<sup>74</sup>

*c. Allegations of Interest of Parties.*

**§ 201. Allegations of Plaintiff's Title or Interest.**

The stating part of the bill must contain a sufficient statement of the interest of the plaintiff in the subject-matter of the suit, and it must appear that the interest or title of the plaintiff is such as to enable him to maintain the suit.

1. *Philippi v. Philippe* (1885) 115 U. S. 151, 29 L. ed. 336: A bill was filed for a settlement and accounting of ancient partnership affairs. There was an averment that the defendant had promised to render an account of the partnership affairs, but it was not alleged that on settlement anything would have been due to the plaintiff. The bill was said to be defective, but the error was not treated as vital.

2. *Jones v. Bolles* (1869) 9 Wall. 364, 19 L. ed. 734: A bill was filed by a stockholder to enjoin the enforcement, against the company, of a contract held by the individual defendant. The plaintiff alleged and proved that he had, at a certain previous period, purchased on his own account and as trustee for others a large amount of stock. It was held that his interest as a stockholder was sufficiently shown, no attempt having been made to show that he had parted with such stock.

3. *Marshall v. Turnbull* (1888) 34 Fed. 827: In setting forth plaintiff's title or interest in the subject-matter of the suit, it appeared that he claimed under and by virtue of a mortgage; but the bill did not set forth the terms of the mortgage, nor was it made an exhibit to the bill. It was held that the bill was demurrable.

**§ 202. Allegation of Performance of Condition Precedent.**

The statement of an interest in the subject-matter of the suit is not sufficient to enable a plaintiff to institute a suit in respect to that subject-matter, if it appears from the bill that the right to sue is dependent on the performance of some condition that does not appear to have been fulfilled. An executor, for instance, has an adequate

(1872) Fed. Cas. No. 18,160; Consolidated Co. v. Detroit Co. (1890) 47 Fed. 804; American Graphophone Co. v. National Phonograph Co. (1904) 127 Fed. 349.

<sup>73</sup> *Nourse v. Allen* (1859) Fed. Cas. No. 10,367, 4 Blatchf. 376; *Perry v. Corning* (1870) Fed. Cas. No. 11,004, 7 Blatchf. 195; *American Graphophone Co. v. National Phonograph Co.* (1904) 127 Fed. 349.

<sup>74</sup> *Blessing v. Copper Works* (C. C.; 1888) 34 Fed. 753; *Consolidated Co. v. Detroit Co.* (C. C.; 1890) 47 Fed. 804; *Nathan v. Craig* (C. C.; 1890) 47 Fed. 522; *Krick v. Jansen* (C. C.; 1892) 52 Fed. 823; *Ross v. City of Fort Wayne* (C. C.; 1893) 56 Fed. 404; *Elliott Co. v. Fisher* (C. C.; 1901) 109 Fed. 330; *American Graphophone Co. v. National Phonograph Co.* (1904) 127 Fed. 349.

interest in the personal property of his testator from the time of the testator's death, but he is not entitled to sue in respect to that interest until he has proved the will. Accordingly the executor, upon instituting a suit concerning the estate of his testator, must allege that he has proved the will in the proper court.<sup>75</sup> And, generally, the bill must allege the performance of all conditions precedent that are essential to vest in the plaintiff such a title as will enable him to sue.<sup>76</sup>

### § 203. Nature of Plaintiff's Interest.

The bill must show an actual, subsisting, and enforceable interest in the plaintiff. A mere possibility, or even probability, of a future title is not enough.<sup>77</sup> But if a present subsisting interest is shown, it is not, generally speaking, material how minute such interest may be, or how distant the possibility of possession. A present interest the enjoyment of which may depend on the most remote and improbable contingency is nevertheless a present estate.<sup>78</sup>

### § 204. Demurrer for Want of Interest in Plaintiff.

If it does not appear that the party suing has an interest in the subject-matter, and a proper title to institute a suit concerning it, the defendant may demur.<sup>79</sup> The rule applies not only to one plaintiff but to all the plaintiffs; and if several persons join in filing a bill and it appears that one of them has no interest, the bill will be open to demurrer, though it appear that all the other plaintiffs have a sufficient interest in the subject-matter to enable them to prosecute the suit.<sup>80</sup>

### § 205. Allegation of Title to Property.

In a suit involving the title to property the plaintiff must set forth in his bill every fact necessary to make out a valid title in him; and the allegations should be the more precise at that particular point in

<sup>75</sup> *Humphreys v. Ingledon* (1721) 1 *specimen of title deeds and other relief*, P. Wms. 188; 1 *Dan. Ch. Pr.* 416, 421. though a bill would lie for that purpose.  
<sup>76</sup> *Walburn v. Ingilby* (1833) 1 *Myl.* by a person entitled to a vested remainder. *Noel v. Ward* (1816) 1 *Madd. Ch.* & K. 61.

<sup>77</sup> *Backvill v. Ayleworth* (1832) 1 *322*.  
<sup>78</sup> *Veru* 105; *Allan v. Allan* (1808) 15 *Veru* 130. A bill cannot be sustained by a purchaser from a contingent remainderman of his interest in the property against a tenant for life for in-  
<sup>79</sup> *Allan v. Allan* (1808) 15 *Veru* Jr.

<sup>80</sup> 1 *Dan. Ch. Pr.* 412.

<sup>81</sup> 1 *Dan. Ch. Pr.* 414.

the chain of title where the plaintiff's claim comes into conflict with that of the defendant.

1. *Harrison v. Nison* (1835) 5 Pet. 483, 9 L. ed. 201: A bill was filed in a federal court asking for a construction of a will bequeathing personal property. The bill showed that the testator, though born in Philadelphia, had gone to live in England before the Revolution and had continued to abide there for many years. Later he lived in America and executed the will in question in Philadelphia. He then again went to live in London and died there. The bill did not allege whether his legal domicile was in Pennsylvania or Great Britain. When the suit reached the supreme court, this court declared that it could not decide the case on the merits without knowing the domicile of the testator, for the reason that the construction of a will bequeathing personalty depends on the law of the testator's domicile, and the plaintiff's title was derived from the will. Accordingly the case was remanded in order that the bill could be amended so as to set in proof as to the domicile of the testator both at the time of the execution of the will and at the time of his death. [This seems to be an instance where unnecessary particularity of pleading was required. The materiality of the fact of the testator's domicile having become apparent, it would apparently have been fairly good practice to remand the case to supply the evidence on this point. The ruling of the court evidently proceeded on the idea that the allegation of domicile was essential to make out the plaintiff's title, and in this aspect the ruling was possibly justified. There was a vigorous dissent by one of the judges.]

2. *Otto v. Regina Minto-Bos Co.* (1898) 37 Fed. 510: In a bill filed by one claiming ownership of a patent it was necessary that title should be made to appear in him. The plaintiff claimed under an assignment from the administrator of the deceased patentee. The averment in the bill was to the effect that the patentee having died, the administrator in question was duly appointed by the surrogate of a designated county. It was held on demurrer that the allegation in question was insufficient. An administrator gets his authority from the grant of letters and not from his purported appointment, and a grant of letters to him should have been averred. It was also stated, though the point was not necessary to the decision, that the bill should have recited the jurisdictional facts which authorized the surrogate of that city to grant letters of administration, such as the residence and intestacy of the deceased and the leaving of administrable goods.

### § 206. Allegation of Claim or Interest of Defendant.

As the bill is required to show the interest and title of the plaintiff in and to the subject-matter of the suit, and to show generally an injury to the plaintiff for which equity will give redress, so it is necessary for the bill to aver that the defendant likewise has or claims a litigable interest in the property or other subject-matter of the suit. Thus, if the suit is concerned with a property right, the defendant should be alleged to have some sort of claim or interest therein, as title or possession.<sup>51</sup>

<sup>51</sup> *McClanahan v. Davis* (1850) 3 How. 170, 12 L. ed. 1033.

**§ 207. Liability of Defendant Must Appear.**

The nature of the liability to which the defendant is subject should always be clearly set forth, and when that liability arises by virtue of acts done in a fiduciary character, this fact should be duly indicated. Where a bill seeks to fix liability on a defendant in respect of acts done by him in two different capacities, as in the capacities of executor and trustee under a will, the bill should discriminate as to those two capacities.

*Taylor v. Benham* (1847) 5 How. 277, 12 L. ed. 151: A bill was filed against an executor acting under a will in a double fiduciary capacity. One of the trusts imposed on him by the will was to sell certain lands held in trust by his testator in Kentucky; the other, to sell property in South Carolina held in the testator's own right. The bill was said to be defective for failing to discriminate these two capacities of the defendant. But as no objection had been taken in any stage of the suit, the supreme court observed that the defect should be considered cured, more especially as it was a proceeding in chancery and enough was alleged to indicate with distinctness the subject-matter in dispute.

**§ 208. Qualification of Foregoing Rule.**

An exception to the rule that the bill must show an adverse interest, claim, or title in the defendant, or a distinct ground of liability on his part to the plaintiff, is found in those cases where the members or officers of a corporation are joined with the corporation as defendants for purposes of discovery. Other cases present exceptions that are more apparent than real. Thus where arbitrators, attorneys, agents, or trustees, are joined, it frequently appears that no relief is sought against them. But here it will be generally found that the right to make such persons parties is confined to cases where some sort of relief is, in fact, prayed against them.<sup>22</sup>

**§ 209. Degree of Certainty Required in Stating Defendant's Interest.**

It is to be observed that the same precision that is required in stating the interest, title, and right of the plaintiff is not requisite in stating the interest, claim, or liability of the defendant. The plaintiff cannot be supposed to know the nature of the defendant's interest as fully as he is required to know his own case. And even where it is manifest from the circumstances of the case that the plaintiff must be aware of the nature of the defendant's title, and he sets it out informally, yet if he alleges enough to show that the defendant has an interest, it will be sufficient.<sup>23</sup>

<sup>22</sup> 1 Dan. Ch. Pr. 426.

<sup>23</sup> 1 Dan. Ch. Pr. 426.

*d. Miscellaneous Averments.***§ 210. Allegations Explanatory of Apparent Laches.**

Laches or delay in the institution of a suit is an element which, under certain conditions, destroys the plaintiff's title to equitable relief and puts him completely out of court. It will be observed that laches is not, in its fundamental essence, a defense in the nature of matter in avoidance; it is an element whose presence destroys the equitable right of action so far that no avoidance is necessary. The plaintiff is, so to speak, out of court before he begins. The absence of laches is an absolute prerequisite of the right of a plaintiff to get any sort of relief. The presence of laches is equivalent to a want of equity. From this it follows that no bill states a cause for relief unless the statements made therein show on their face that the cause of action is not affected with the vice of staleness; and the principle of pleading is that, if the recitals of the bill are such as to give rise to an imputation of laches, the plaintiff must go on to explain the delay and show why it should not have the effect of putting him out of court. If the institution of the suit has apparently been delayed for an unreasonable time, some valid excuse must be shown, such as ignorance on the part of the plaintiff of the existence of the cause of action. And the plaintiff must not merely allege such ignorance, but he must show when and how knowledge was obtained in order that the court may determine whether timely and reasonable efforts were made to ascertain the facts. If apparent laches is not thus explained and rebutted by the allegations of the bill, a demurrer will lie.<sup>84</sup>

**§ 211. Application of Doctrine of Laches.**

The doctrine of laches, as applied in courts of equity, is sufficiently flexible to give reasonable effect to the special circumstances of any case, and it rests not alone on the lapse of time but on the inequity of permitting the claim to be enforced, because of some change in the condition or relations of the property or the parties.<sup>85</sup>

**§ 212. Statute of Limitation as Affecting Question of Laches.**

In the application of the doctrine of laches, courts of equity are not absolutely bound by the statute of limitations, but they usually

<sup>84</sup> *Stearns v. Page* (1840) 1 Story, 204, 215, 217 (1849) 7 How. 819, 829, 67 C. C. A. 284, 133 Fed. 28, 31; *Ham-12 L. ed. 928, 932*; *Badger v. Badger* 12 L. ed. 836; *mond v. Hopkins* (1892) 143 U. S. 224, (1904) 2 Wall. 87, 17 L. ed. 836. <sup>85</sup> *Stevens v. Grand etc. Co.* (1904) 250, 12 Sup. Ct. 418, 36 L. ed. 134, 145;

act or refuse to act in accordance with the analogy of the statute of limitations relating to actions at law of like character. If unusual conditions or extraordinary circumstances make it inequitable to permit the prosecution of a suit after a briefer period, or to forbid its maintenance after a longer period than that fixed by the analogous statute, the court of equity will not follow the statute, but will determine the case in accordance with the equities which arise from its own conditions or circumstances. When a suit is brought within the time limited by the analogous statute, the burden is upon the defendant to show, either from the face of the bill or by his answer, that unusual conditions or extraordinary circumstances exist which require the application of the doctrine of laches; and, when such a suit is brought after the statutory time has elapsed, the burden is on the plaintiff to show by suitable allegations in his bill that it would be inequitable to apply it to his case.<sup>66</sup>

### § 213. Allegations Explanatory of Apparent Estoppel.

A similar rule to that enforced in regard to laches is applicable where the plaintiff sets up matters sufficient to make out any sort of equitable estoppel against himself. He must in his bill sufficiently explain those matters away, otherwise the bill cannot be maintained.<sup>67</sup>

### § 214. Such Matters Pleaded in Stating Part of Bill.

Matters set out in avoidance of laches or in avoidance of an equitable estoppel, in obedience to the rule above indicated, are properly put in the stating part of the bill, for such matters are usually so intimately connected with the facts on which the plaintiff's equity rests that in narrating those facts he may most naturally and most conveniently also bring out those features of the case which rebut the imputation of laches. The proposition that matter in avoidance of

Townsend v. Vanderwerker (1895) 160 (1903) 57 C. C. A. 361, 312, 125 Fed. U. S. 171, 186, 16 Sup. Ct. 258, 40 L. 819; Wyman v. Bowman (1904) 62 C. ed. 383, 388; Ward v. Sherman (1904) C. A. 189, 127 Fed. 257, 269; Brown v. 192 U. S. 168, 176, 24 Sup. Ct. 227, 48 Arnold (1904; C. C. A.) 67 C. C. A. L. ed. 391, 395; Bryan v. Kales (1890) 125, 191 Fed. 723, 727; Richardson v. 184 U. S. 126, 136, 16 Sup. Ct. 438, 53 O'Brien (1900) 44 C. C. A. 406, 474, 106 L. ed. 829, 832. Fed. 277, 53 L.R.A. 113.

<sup>66</sup> Kelley v. Boettcher (1898) 29 C. F. Wollensak v. Reiber (1885) 115 U. C. A. 14, 21, 85 Fed. 55; Ida v. Tror- S. 101, 29 L. ed. 351, 5 Sup. Ct. Rep. Nott etc. Co. (1902) 53 C. C. A. 341, 1187; Post v. Benson etc. Co. (1898) 52 362, 115 Fed. 187; United States v. C. C. A. 151, 59 Fed. 1; Whinn v. Bagot Chicago etc. Co. (1902) 54 C. C. A. (1885) 67 Fed. 490.

545, 116 Fed. 906; Boynton v. Haggart

laches should be put in the stating part of the bill is borne out by equity rule 21, in which it is declared that the plaintiff may in the narrative or stating part of his bill state and avoid by counter-averments any matter or thing that he supposes will be insisted on by the defendant by way of defense.

#### § 215. Allegations in Avoidance of Statute of Limitations.

The same principle of pleading is applied in regard to the technical defense of the statute of limitations as in regard to laches and estoppels; and wherever it becomes necessary to avoid the effect of the statute of limitations by proof of equitable circumstances, such as ignorance and fraudulent concealment, it is necessary to aver those circumstances in the bill, otherwise proof of them is not admissible.<sup>20</sup> Such matters are properly put in the narrative, or stating, part of the bill.<sup>20</sup>

#### § 216. Plaintiff's Offer to Do Equity.

It is ~~sometimes~~ essential to the equity of a bill that the plaintiff should make a formal offer to do equity to the defendant. This is required in ~~those cases where the equitable powers of the court are invoked in order to rescind or annul a contract agreement, or judgment, or otherwise to restore the parties to a former status quo.~~ As a condition of giving relief in such cases the court requires that the plaintiff shall do equity to his adversary, and it is appropriate, though not always absolutely necessary, that such an offer should be made in the bill. In a bill to impeach a compromise judgment unauthoriz-  
edly entered by a United States district attorney, it is necessary for the United States to offer to do equity by repaying the sum paid on such compromise judgment. But the money need not be brought into court. The necessary payment can be easily and properly credited on the litigated claim.<sup>20</sup>

#### § 217. What Is Sufficient Offer of Equity.

In a bill for the rescission of a sale of land, there is a sufficient offer to do equity on the part of the plaintiff where an accounting is asked for and the plaintiff proposes to allow proper credits for sums lawfully expended on improvements made on the faith of the sale.<sup>21</sup>

<sup>20</sup> *Boyd v. Wiley* (1893) 18 Fed. 255.

<sup>21</sup> *United States v. Beebe* (1900) 180 U. S. 354, 21 Sup. Ct. 371, 45 L. ed. 563.

<sup>20</sup> Equity Rule 21. Formerly matter in avoidance was put in the charging part of the bill.

<sup>21</sup> *Kessler v. Ensley Co.* (1904) 129 Fed. 397.



## CHAPTER V.

### BILL IN EQUITY (*continued*).

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*The Confederating Clause.*

**§ 218. Nature and Purpose of Confederating Clause.**

The fourth part of the bill consists of what is known as the confederating, or common conspiracy, clause. Properly speaking, this would seem to be rather a mere feature or subordinate division of the stating or charging part of the bill than an independent part of the bill considered in itself. But the point is unimportant.

The confederating clause consists of nothing more than an allegation to the effect that the grievance complained of by the plain-

tiff was brought about by a conspiracy among the several defendants and others not made parties to the bill. All these persons, so it is alleged, confederated and conspired to injure the plaintiff and co-operated in the perpetration of the wrong. This averment is in most cases purely fictitious; but, like most fictions, it no doubt had its origin in certain elements of fact. It is a well-known matter of history that one of the main causes that first gave occasion for the exercise of the equitable jurisdiction of the chancery court was found in the evils resulting from combinations and confederacies set afoot by powerful persons to overawe or pervert the ordinary administration of justice. It was but natural that such allegations should always appear in the bill where there was any color of truth therefor. One basis for the insertion of this clause in the bill is found in the idea that, where it is used, the plaintiff, upon discovering the names of the other persons who have contributed to the injury or who have taken part in it, may thereupon make them parties defendant and bring them in to be bound by the decree.<sup>1</sup> It seems to have been considered that without this charge confederates could not be added to the bill by amendment. But this is a mistake, and the clause in question is wholly superfluous. Equity rule 21 provides that a plaintiff shall be at liberty to omit the common confederacy clause, if he sees fit to do so. If inserted at all, it must be considered mere surplusage.<sup>2</sup>

### § 319. When Special Charges of Combination and Conspiracy Proper.

While the common conspiracy clause in the bill is, generally speaking, unnecessary and redundant, it nevertheless happens that in some causes the plaintiff's title to equitable relief arises out of some conspiracy in fact entered into by the defendants. Where this is so, the clause is, of course, properly and necessarily included in the bill. Here it is the basis, or one of the bases, of the equitable jurisdiction of the court. But it is to be noted that where the charge of conspiracy is thus essential, the charge must be special and not in the general terms used in the common confederacy clause.

<sup>1</sup> The usual form of the charge in the confederating clause is that the defendants, combining and confederating together, and with divers other persons and others, do absolutely refuse, etc., of premises, when discovered, he prays may be inserted in the bill, and they be made parties defendants thereto, with proper and apt words to charge them with the premises in order to injure and oppress the plaintiff in the premises. Story, Eq. Pl. § 22.

<sup>2</sup> Story, Eq. Pl. § 22.

*The Charging Part of the Bill.**a. Charges of Evidence as Basis of Discovery.***§ 220. Function of Charging Part.**

From the origin of the court of chancery one of the most effective and one of the most important of the powers exercised by this court was found in its ability to compel the defendant to discover evidence essential to the establishment of the plaintiff's cause. It is the chief function of the charging part of the bill to supply the basis of the desired discovery. To this end it is necessary that the plaintiff, in the charging part of his bill, should state the general tenor of the matters to be discovered. In other words, the charging part of the bill must contain the requisite charges of evidence. Just as the stating part of the bill is the proper vehicle for those matters of fact that are necessary to be stated to make out a case for relief on the face of the pleadings, so the charging part of the bill is the proper vehicle for charges of evidence.

**§ 221. Relation of Stating and Charging Parts of Bill.**

Every bill of discovery and relief thus assumes a double aspect. It must contain a statement of the facts on which relief is sought and a statement of the matters of evidence in regard to which discovery is desired. The rule of pleading to which this leads may be stated as follows: In drawing bills the pleader must state evidence for the purpose of obtaining discovery, but for other purposes he needs only to state facts. The common mode of complying with this rule is, first to state the facts of the case in the stating part of the bill and then to state, or "charge," evidence of those facts in the charging part of the bill.<sup>3</sup>

It so happens that as a matter of pleading and procedure these two different aspects and features of the bill have not been kept wholly distinct. Indeed great difficulty would be experienced if a genuine attempt were made to keep them wholly apart and distinct from each other. Matters of fact and of evidence easily interfuse, and a pleader would never feel quite safe if he were required to divide nicely between them. As a consequence we find that the formal distinction between the stating part of the bill and the charging part, so far as

<sup>3</sup> Langdell, Eq. Pl. § 57.

the first is concerned with the statement of mere facts and the second with the statement of evidence of facts, has not been strictly observed. The two parts are to a great extent mingled. The result is that the defendant is required to answer the allegations of the whole bill in both its aspects. That is, instead of being required to answer the allegations of the stating part of the bill, considered as a mere pleading,—which requirement would be fully met by a mere denial or admission *not under oath*,—and to answer the charging part of the bill considered as evidence to be discovered under oath, he is required to answer fully, and under oath, all the allegations of the bill both as regards the statement of facts and the charges of evidence. The answer as a pleading is amalgamated with the answer as a discovery of evidence, just as the whole bill is considered as being one though it comprises two distinct elements.

#### § 222. Scope and Purpose of Charges of Evidence.

This fusion of the two features of the bill and answer results in some rules that are apparently anomalous, but this is no doubt compensated by considerations of greater convenience. So far as the formal distinction between the stating and charging parts of the bill is concerned, it might be better to say that these are not so much different parts of the bill as they are different features of it. The same written document simply has two different aspects. But so far as these features are formally embodied in different parts, we find that the charging part merely contains a fuller and more detailed narrative of the facts or evidence of facts, and its purpose is to compel the defendant to answer more fully and more minutely as to the details. But in whatever form the matter is put or considered, the defendant must answer all the allegations of the bill. In the charging part of the bill the plaintiff can allege, or charge, any collateral fact or circumstance, the admission of which by the defendant would be material in proving the plaintiff's case or in subverting the defendant's defense, or that would be of value in ascertaining or determining the nature and extent of the relief to which the plaintiff asserts a claim, or even matter that might lawfully influence the court in fixing the costs.<sup>4</sup>

The fullness and particularity of the charges of evidence will vary according as the plaintiff's information as to the nature of the evidence varies in each case, and within certain limits it is permissible

<sup>4</sup> *Hawley v. Wolverton* (1836) 5 Paige, 532.

for him to vary his charges, but he must not cause them to be repugnant to the bill or inconsistent with each other.

In connection with the subject of charges of evidence, it is to be observed that a plaintiff never has to charge evidence that he expects to prove by any of the recognized modes of making proof other than that of discovery. If the plaintiff can prove any material fact by the independent testimony of other witnesses than the defendant, he need never charge that fact as matter of evidence. All he needs to do in this regard is to set forth such a case in the stating part of the bill as will make the evidence admissible as being within the scope of his pleadings.<sup>5</sup>

### § 223. Charges of Confessions and Admissions.

To the rule stated in the preceding paragraph there used to be a peculiar exception, or seeming exception, that is no longer in force. Confessions and admissions made by a defendant are upon principle always admissible and pertinent as evidence against him, and such may be proved by the independent testimony of any witnesses who may have heard them. But it was formerly the rule in England that the plaintiff could not put in evidence any confessions or admissions made by the defendant that tended to establish the plaintiff's case unless the bill expressly charged such confessions or admissions.<sup>6</sup> If the confessions or admissions were in writing, it was required that the nature of the writing should be stated and its date given.<sup>7</sup> The idea in adopting this rule was to guard against the danger and injustice of surprise; and the rule was not a bad one when we consider the fact that, under the old practice, the testimony was secretly taken and that, in the absence of such a requirement, the defendant against whom admissions were put in evidence would have been unable even to cross-examine the witness on such point.

### § 224. Present Practice as to Charges of Confessions and Admissions.

But under the modern practice, the interrogatories and cross-interrogatories are known to the solicitors, and the testimony is not kept secret as formerly. Consequently the need for any such rule is past, and it must be considered obsolete. The relevant admissions and confessions of the respective parties are, we would say, admis-

<sup>5</sup> Langdell, Eq. Pl. § 59.

<sup>7</sup> *Whitley v. Martin* (1840) 3 Beav.

<sup>6</sup> *Austin v. Chambers* (1838) 6 Clark 226.

<sup>4</sup> F. 1, 38; *Earle v. Pickin* (1831) 1 Russ. & M. 547; *Hall v. Maltby* (1818) 6 Price, 240, 252, 258.

sible in equity under substantially the same rules and subject to the same conditions as they would be admissible in actions at law.<sup>8</sup> Of course if admissions are charged in the bill, it is proper for the plaintiff, if he files interrogatories, to ask the defendant whether those admissions were made. Such interrogatories are not subject to exceptions for impertinence.<sup>9</sup>

### § 225. Charges of Documents.

The occasion for putting charges of evidence into a bill frequently arises out of the fact that the defendant has documents in his possession that furnish the best evidence of the matters in controversy and of which it is therefore necessary for the plaintiff to secure the production. Under the modern practice the production of documents can be effectively enforced in other modes than by discovery under oath in response to charges of documents duly inserted in the bill, but formerly it was otherwise, and it was always necessary for a plaintiff who wished to rely on such evidence to proceed by way of obtaining discovery, under oath, of the documents said to be in the defendant's possession. Unless a charge of documents was inserted in the bill the defendant was never required to disclose in his answer whether he had in his possession any documents pertinent to the plaintiff's case, and therefore if the plaintiff wished the defendant to answer as to documents it was necessary for him to charge that the defendant had in his possession, custody, or power, papers, documents, writings, or books, as the case might be, relating to the allegations of the bill and by which, if produced, the truth of those allegations would be made to appear; or, perhaps, it was enough to allege that the matter contained in those documents was relevant to the matters charged in the bill.<sup>10</sup> It is to be observed that the modern practice introducing other modes of securing the discovery and production of documents has not rendered the method now under consideration obsolete, but has only added the new mode of procedure to the old. A plaintiff may, if he chooses, still enforce the discovery of documents by answer under oath.

<sup>8</sup> *Brandon v. Cabiness* (1846) 10 Ala. 155; *Bishop's Heirs v. Bishop* (1848) 13 Ala. 476; *Bailey v. Wright* (1862) 24 Ark. 73; *Cannon v. Collins* (1867) 3 Del. Ch. 132. See *Smith v. Burnham* (1837) 2 Sumn. 612. We say that the rule must be considered obsolete on the principle embodied in the maxim *quæritur ratio cessat ipso iure*. We have found no decision from any of our federal courts where the rule has been applied.

<sup>9</sup> *Smith v. Burnham* (1837) 2 Sumn. 612.

<sup>10</sup> *Combe v. Corporation of London* (1845) 15 L. J. Ch. N. S. 80; *Langdell*, Eq. Pl. § 205.

*b. Charges of Matter in Avoidance of Anticipated Defense.***§ 226. Series of Pleadings in Equity.**

We are now to learn that the charging part of the bill is not exclusively used as a vehicle for charges of evidence inserted for the sole purpose of obtaining discovery. It is also used for another and very different purpose, as we shall see. The normal series of pleadings originally used in the court of chancery, that is, after a settled practice in regard to the course of pleading had been first adopted, consisted of the bill, answer, and replication, with a possible rejoinder thereto; and the replication could be either general or special. The purpose of the bill was to state the plaintiff's case briefly and concisely. The purpose of the answer (considered as a pleading) was to make out a defense. This defense could take either one of two forms: it could consist exclusively of mere denials, in which case the answer was purely defensive; or it could consist of new matter set up by way of avoidance. Of course also, in particular cases, the answer might embody both features. Now if the answer consisted of denials only, all the plaintiff was required to do in order to put the cause properly at issue was to put in a general replication traversing the answer. If the answer consisted of new matter set up by way of an affirmative defense, the general replication would not serve the purpose. Here it was necessary for the plaintiff to put in a special replication, and set up new matter sufficient to meet and avoid the affirmative matter set forth in the defendant's answer. Thus if the defendant, by way of affirmative defense, set up a release, or the statute of limitations, the plaintiff had to set out in his special replication matters in avoidance of such defense. It will be observed that such a replication was in the nature of a supplement to the bill itself. A special replication was also necessary where the plaintiff had no affirmative defense but wished a discovery of matters that would aid him in disproving the truth of the new matter set up by the defendant. In case a special replication was put in setting up new matter in avoidance or asking for discovery to disprove the new matter, the defendant could rejoin. The pleadings could be, but in fact seldom were, carried further than this.

**§ 227. Equity Pleading Becomes Too Cumbersome.**

It will be seen that the series of pleadings thus used in the early chancery practice bore some resemblance to that in vogue in the courts of law. However, the equity system lacked one very important

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feature which has always characterized the pleadings in courts of law and which has served as a salutary check to prevent abuse. This is found in the rule that a party who, in pleadings at law, sets up affirmative matter to meet the facts alleged by his antagonist thereby admits the adversary's pleading to be true. But in the court of chancery this rule did not exist, nor did the court of chancery have any system by which it could exercise a sufficient control over the pleadings, as had always been the case in the ecclesiastical courts. The result was that the practice of extending the pleadings in equity beyond the answer led to great confusion. To use the words of Professor Langdell, "the pleadings degenerated into a war of words in which neither party was willing to acknowledge defeat by being the first to leave the field."<sup>11</sup>

### § 228. Parties Restricted to Single Pleading.

In order to avoid this difficulty the court of chancery abolished the rule allowing the series of pleadings to extend on indefinitely as long as either party had any new matter to set up, and instead it adopted a practice of requiring the adverse parties to confine themselves respectively to a single pleading in which all the matters relied on should be set forth. As a result the plaintiff's bill, under the changed practice, contained the entire series of pleadings on the plaintiff's side and the answer contained the entire series of pleadings on the defendant's side. The general replication was, however, retained as a matter of form. The change of practice here referred to took place at a comparatively early day, apparently before the close of the seventeenth century.<sup>12</sup>

### § 229. Bill Now Contains Matter of Special Replication.

From what has been said it appears that under the practice now in vogue the original bill contains the matter that would formerly have been put into the special replication or surrejoinder, if the pleadings under the old practice would have extended thus far; and the proper place in the bill to put such matter was considered to be in the charging part. Such was the English rule of practice. But under the equity rules in force in the federal courts this matter may be put into the narrative or stating part of the bill.<sup>13</sup>

<sup>11</sup> Discovery under Judicature Acts, C. C. Langdell, 11 Harvard Law Rev. 207.

<sup>12</sup> Langdell, Eq. Pl. § 87, note.

<sup>13</sup> Equity rule 21.

**§ 230. Mode of Charging Anticipated Defense.**

As to the mode of pleading matter in avoidance of an anticipated defense, it may be said that the course commonly pursued is for the plaintiff first to charge or allege in the bill that the defendant pretends so and so, setting out the ground on which the plaintiff anticipates that the defense will be rested. Then the bill answers such pretended defense by way of anticipation.<sup>14</sup>

**§ 231. Amendment of Bill to Meet Special Defense.**

It must often happen that the plaintiff is not able to foresee the putting in of such an affirmative defense by the defendant as would formerly have required a special replication, and hence it is impossible for him to insert by way of anticipation in the bill matters in avoidance of such defense. The adoption of the rule that matter suitable for a special replication must be put in the bill resulted therefore in the adoption of another rule to the effect that after the answer is filed the plaintiff may, if he wishes to do so, amend the bill by putting into it any matter in avoidance of the defense set forth in the answer.<sup>15</sup> And a similar liberality of practice was adopted in regard to the defendant, he being always permitted to put in a further answer, if necessary, after the bill has been amended by the plaintiff.

*The General Jurisdiction Clause.***§ 232. Jurisdiction Clause Not Necessary.**

A sixth feature, or part, of the bill consists of the jurisdiction clause. This is merely an allegation in general terms to the effect that the acts complained of are contrary to equity and tend to the injury of the plaintiff, and that the plaintiff has no remedy, or no adequate remedy, without assistance from the court of equity. This clause, like the common confederacy clause, is wholly superfluous. One of the fundamental rules of equity pleading is that the bill must set forth a cause of equitable cognizance, and if it does not do

<sup>14</sup> *Stafford v. Brown* (1833) 4 Paige, 88. same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct. Equity Rule 45. In *Edison etc. Co. v. Equitable Life Soc.* (1893) 55 Fed. 478, the plaintiff was required to amend his bill so as to avoid the defense of laches.

<sup>15</sup> *Stafford v. Brown* (1833) 4 Paige, 88, 91. No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the

so the bill is demurrable. The allegations relating to the matter of jurisdiction cannot be shown by general averments. The facts must speak for themselves. It follows that the general jurisdiction clause will not confer jurisdiction, where the case made in the bill is not one of equitable cognizance.

Under equity rule 21 the plaintiff is at liberty to omit the general jurisdiction clause of the bill. While this suggestion may well be followed in most cases, it is yet sometimes desirable for the plaintiff to point out explicitly that he has no adequate remedy at law and to show wherein the inadequacy of the legal remedy consists. But this point can be incidentally brought out in developing the facts on which the suit is founded, and it is not necessary to give it prominence as an independent part of the bill.

#### *The Interrogatories.*

##### **§ 233. Interrogating Part of Bill.**

We have seen that one of the uses of the charging part of the bill is to supply a detailed statement of the facts, considered in the aspect of evidence, in order that the defendant may be constrained to give discovery as to such specific matters by admitting them to be true. Now it is usually a very difficult proceeding to get any party to admit facts that it is contrary to his interest to admit, and consequently in enforcing discovery the plaintiff often finds himself thwarted by the elusiveness and evasions of the defendant. In contending with this trouble it became customary with pleaders at an early day to insert in the bill specific questions for the defendant to answer. These were in addition to the charges of evidence contained in the charging part of the bill. At first this innovation of the pleaders attracted little or no attention from the court, but it was found to be effective and consequently grew in favor. In the end the interrogatories became the chief instrument on which reliance was placed for eliciting the truth, while the charges of evidence on the other hand grew less important. The interrogatories thus came to be recognized as a distinct feature and part of the bill, and in answering the defendant was required to answer fully not only the allegations and charges of the bill, but all the proper interrogatories as well.

##### **§ 234. Use of Interrogatories Confined to Equity Practice.**

It is of interest to note that this system of practice by which the plaintiff is permitted to file interrogatories with his bill and to

obtain discovery or admissions from the defendant as to facts material to his case, is peculiar to equity. The federal courts when sitting as courts of law do not permit such use of interrogatories in connection with the plaintiff's complaint; and even though the state practice permits of it, the federal courts, sitting at law, refuse to follow the state courts in such procedure.<sup>16</sup>

**§ 235. Interrogatories Not Permissible in Answer.**

Again, the plaintiff in equity cannot be compelled to respond to questions propounded to him in the defendant's answer. A cross-bill must be framed for this purpose. Nor will the practice be varied on this point to conform to any state law. The supreme court rules are controlling.<sup>17</sup>

**§ 236. General Interrogatory.**

There are two sorts of interrogatories, or perhaps, more accurately, the interrogating part of the bill comprises two features. The first is the general interrogatory, the second comprises the special interrogatories. The general interrogatory calls on the defendant to make full, true, and perfect answer to each and every allegation of the bill, or what is the same in effect, it prays the court to require the defendant to appear in court and answer those allegations. This general interrogatory is found near the conclusion of the bill and is inserted even though an answer under oath is waived and no special interrogatories are added or particular discovery sought. The general interrogatory inheres in the fundamental conception of the bill, and this feature of the bill long antedates, of course, the feature of special interrogatories. In fact it was from the idea embodied in the use of the general interrogatory that the practice of adding special interrogatories had its origin. The need for the general interrogatory is not abolished by the use of special interrogatories, and every bill should at least contain a general interrogatory requiring the defendant to answer the allegations of the bill, or some equivalent expression calling on him to respond. If a bill contains a general interrogatory requiring the defendant to answer its allegations,

<sup>16</sup> *See* *p. Fink* (1885) 113 U. S. 713, *apolis Journal, etc. Co.* (1895) 66 Fed. 5 Sup. Ct. 724, 28 L. ed. 1117; *Marvin v. C. Aultman & Co.* (1891) 46 Fed. 238; *Pierce v. Union Pac. Ry. Co.* 620, 624, 7 L. ed. 287, 289. (1891) 47 Fed. 709; *Tabor v. Indian-*

<sup>17</sup> *McDonald v. Smalley* (1828) 1 Pet.

special interrogatories are not essential to force the defendant to make a complete response to the bill.<sup>18</sup>

### § 237. Form of General Interrogatory.

A general interrogatory at the end of a bill requiring the defendant to answer all the matters alleged in the bill as fully and particularly as though specifically interrogated thereon, is a sufficient interrogatory.<sup>19</sup> A prayer that the defendant be required to "answer unto the premises" is also a good general interrogatory.<sup>20</sup>

### § 238. Nature and Form of Special Interrogatories.

The special interrogatories constitute the interrogating part of the bill as more generally and properly understood. They should be put in a series very much as are the interrogatories for the taking of a deposition. They should be consecutively numbered for purposes of reference. If there are several defendants an underwritten note must specify the particular questions each several defendant is required to answer. A cumbersome paragraph designed to serve the purpose of a formal introduction to the special interrogatories is found in the equity rule 43. A simpler introduction containing the substance of that prescribed in the rule can be readily penned by any competent lawyer, and it is accordingly recommended to the practitioner that he may safely attempt to do so.

<sup>18</sup> *McClaskey v. Barr* (1889) 40 Fed. 559. ant was required to answer fully. The rule does not expressly say that the

It has been queried whether equity rules 41-43, permitting a plaintiff to file special interrogatories and prescribing their form, have abrogated the rule that a general interrogatory is sufficient to require the defendant to answer fully all the allegations of the bill. *U. S. v. McLaughlin* (1885) 24 Fed. 824. This suggestion overlooks the import of rule 40 as changed in 1850. The old rule of equity pleading was that the bill should contain a general interrogatory and under such interrogatory the defendant was required to give full discovery. Equity rule 40, as first put into effect, destroyed the efficacy of the general interrogatory and required the plaintiff to file special interrogatories if he desired the allegations of the bill to be fully answered in respect of discovery. The alteration of the rule in 1850 in turn abrogated this change and re-enacted the old practice, whereby the defend-

general interrogatory shall be put into the bill, but such is the plain import of the rule, and such is the practice, where special interrogatories are not resorted to.

<sup>19</sup> *United States v. McLaughlin* (1885) 24 Fed. 823.

<sup>20</sup> *McClaskey v. Barr* (1889) 40 Fed. 559.

A general interrogatory "that the defendants may full answer make to all and singular the premises, fully and particularly, as though the same were repeated, and they specially interrogated paragraph by paragraph, with sums, dates, and all attending circumstances and incidental transactions," is sufficient to require a detailed answer to all the allegations of the bill. *U. S. v. McLaughlin* (1885) 24 Fed. 823. See *Episcopal Church v. Jaques* (1814) 1 Johns. Ch. 75.

The interrogatories should be referred to in the bill so as to become a part of it; but this requirement is one of form only. Interrogatories filed with a bill may be regarded as a part of the bill, and the defendant will be required to respond thereto, though they be not referred to in the bill and incorporated in it, where it is manifest that the defendant has not been prejudiced by the informality.<sup>21</sup>

**§ 239. Interrogatories Must Be Based on Charges of Evidence.**

From the time when special interrogatories were introduced it was a recognized rule that every question must be based on a material allegation, or charge, in the bill and must be confined to the case made in the bill.<sup>22</sup> But this rule is considered a technical one, and considerable latitude is permissible as to the range of questions. They are put to get information, and the plaintiff must not be assumed to know exactly what state of facts will be developed by the answers to his questions. Interrogatories are not framed and limited on the theory that everything stated in the bill is precisely and in every detail true.

**§ 240. Scope of Interrogatories Based on General Charge.**

A general charge of facts or evidence will authorize the putting of all questions that are necessary to make out the truth of the material facts and incidents connected with that charge. It is not necessary to load the charging part of the bill with all the details that the questions are intended to bring out. One who makes a substantive charge may ask all questions that go to prove or disprove the truth of the substantive charge.<sup>23</sup> An interrogatory is bad, however, which departs from the case made in the bill and calls for the disclosure of irrelevant matters.

*Gormully etc. Co. v. Bretz* (1894) 64 Fed. 612: The case made in the bill was exclusively concerned with a license contract alleged to have been conveyed or assigned by the defendant. An interrogatory called for a statement as to all contracts, licenses, etc. that had been conveyed or assigned by defendant. It was

<sup>21</sup> *Federal Mfg. etc. Co. v. International Bank Note Co.* (1902) 119 Fed. 335. Where the point was raised whether a plaintiff, who had charged the defendant with holding uncertified bonds,

<sup>22</sup> *Gormully v. Bretz* (1894) 64 Fed. 612; *Connolly v. Belt* (1838) Fed. Cas. No. 3,117. could have discovery as to any other bonds, it was held that he could well have discovery as to such other bonds,

<sup>23</sup> See language of Lord Eldon in *Faulder v. Stuart* (1805) 11 Ves. Jr. 296, 301. if his question called for that information. *Chicago etc. R. Co. v. Maccomb* (1880) 2 Fed. 13.

held that this interrogatory was too broad and the defendant was excused from answering. Full reply to it might involve a disclosure of contracts and conveyances other than that in suit and of transactions with respect to which the plaintiff had no right to discovery.

#### § 241. Requisite Precision—Additional Interrogatories.

Although an interrogatory is not as precise and definite in its statement as it should be, yet if its drift be manifest and its import be plain, the defendant must give a fair and full answer. In a case where this rule was applied, Judge Story, in ruling that the defendant must answer more fully, also gave leave to the plaintiff to file additional interrogatories so as to compel direct and positive disclosures as to the facts sought for.<sup>24</sup>

#### *Prayers for Relief.*

#### § 242. General and Special Prayer.

The next part of the bill to be here considered is the prayer for relief. Prayers for relief are either general or special. Every bill must have a prayer for relief of some sort, and out of abundant precaution both the general and special prayers should always be put in the bill. Indeed, so far as federal practice is concerned, it is expressly provided in equity rule 21 that every bill shall contain a prayer for special relief and also a prayer for general relief.<sup>25</sup>

In his special prayer the plaintiff indicates the particular relief which he deems suited to his case and asks the court to grant that relief. In the prayer for general relief he merely asks that he may have "such other, further, and general relief as he may be entitled to." The special prayer has to be framed in conformity with the special circumstances of each case, and its form depends on the particular facts and on the particular equity involved.

#### § 243. When General Prayer Sufficient.

In point of principle a prayer for general relief will alone suffice in all cases where the relief properly grantable clearly and obviously results from the facts stated in the bill; but if it does not, a special

<sup>24</sup> *Langdon v. Goddard* (1843) 3 himself entitled, and also shall contain Story, 13, Fed. Cas. No. 8,061. a prayer for general relief; and if an

<sup>25</sup> In regard to the prayers for relief injunction, or a writ of *ne exeat regno*, equity rule 21 provides as follows: The or any other special order, pending the prayer of the bill shall ask the special suit, is required, it shall also be special-relief to which the plaintiff supposes ly asked for.

prayer is essential. A defendant, it has been said, is entitled to know not only what facts the plaintiff intends to prove in order that he may not be taken by surprise, but also, for the same reason, what use the plaintiff intends to make of those facts.<sup>26</sup>

#### § 244. When Special Prayer Sufficient.

The special prayer will alone suffice if it happens to be so drawn as to pray approximately for the exact relief that the plaintiff shows himself to be entitled to, but if from the nature of the case and from the facts alleged and proved it appears that he is entitled not to the relief especially prayed for but to some other relief, no decree can be made in his favor, unless a general prayer is found in the bill. The general prayer will cure slight omissions or deficiencies in the special prayer, but it will not enable a plaintiff to obtain relief radically inconsistent with the relief specially sought. It follows that it is always advisable to combine a general prayer with a special one. A general prayer alone is better than an incorrect special prayer, and also possibly better than a general prayer coupled with an incorrect special prayer.<sup>27</sup>

#### § 245. Scope and Effect of Special Prayer.

The nature and extent of the relief sought should be indicated by clear, exact, and direct statements apart from the exhibits.<sup>28</sup> The special prayer in a bill does not necessarily determine the character of the bill. The prayer may be too extensive or less extensive, or otherwise different from that which the bill as a whole will justify. The character of the bill is determined by the contents of the whole bill taken together, and chiefly by the facts contained in the stating part. The substance and not the form of the bill determines its character.<sup>29</sup>

#### § 246. Nature of Relief Grantable under General Prayer.

Under a properly drawn prayer for special relief the plaintiff can obtain the exact relief he is entitled to have upon the equitable principles applicable to the facts of the case as pleaded and proved; and no particular treatment is here needed of the nature of the relief grantable under the special prayer. That matter will properly come

<sup>26</sup> Langdell, Eq. Pl. § 61.

<sup>27</sup> Langdell, Eq. Pl. § 61.

<sup>28</sup> Mercantile Trust Co. v. Kanawha  
etc. R. Co. (1889) 39 Fed. 337, 339.

<sup>29</sup> Drexel v. Borneo (1882) 16 Fed.  
622.



up in connection with the subject of decrees. But it often happens that the plaintiff has misconceived his case and has failed to hit upon the prayer adapted to the real cause of action disclosed on the record. In such situations it becomes necessary for him to rely on the prayer for general relief. This makes it of the utmost importance to consider at this juncture the nature and extent of relief grantable under the general prayer.

**§ 247. Relief Must Conform to Case Made in Bill.**

The first and main principle to be noted is that, under the general prayer, the court may grant any relief fairly conformable with the case made in the bill.<sup>20</sup> Where the special prayer is narrower than the case made in the bill, the plaintiff can have broader relief under the general prayer, if the record discloses his right to such relief.<sup>21</sup> But relief that is inconsistent with the theory of the case made in the bill or that rests on grounds not asserted in the bill cannot be granted under the general prayer. As has been well said, "it is a great misapprehension to suppose that one cause of action can be stated in a bill in equity, and by some sort of comprehensive flexibility of chancery jurisdiction relief can be administered growing out of a state of facts not embraced within the facts pleaded. The rule that under the general prayer for relief a party may have any relief to which he may show himself entitled is limited to relief founded on and consistent with the facts set out in the bill, and not such as may be proven at the hearing."<sup>22</sup> The scope and application of the general principle are amply shown in the following illustrative cases.

1. *Texas v. Hardenberg* (1869) 10 Wall. 66, 19 L. ed. 839: A bill was filed against the holder of some United States bonds seeking to enjoin their collection and to compel the delivery of them to the plaintiff. It was held that under the general prayer the plaintiff, having shown a right to recover the bonds in question, could recover the proceeds of such of the bonds as had been disposed of before service of process. There were averments and interrogatories in the bill which looked to the recovery of the proceeds as well as the bonds themselves, but the bill failed to assert plaintiff's right with absolute directness and distinctness. The court observed: "It would savor of extreme technicality to refuse to see in the bill enough in relation to the proceeds of the bonds to warrant relief in this respect under the general prayer."

2. *Tyler v. Savage* (1892) 143 U. S. 76, 26 L. ed. 82: The plaintiff had been induced by Tyler, the president of the defendant corporation, to pay a large sum

<sup>20</sup> *Jones v. Van Doren* (1889) 130 U. S. 692, 32 L. ed. 1080, 9 Sup. Ct. 687. 382, 385.  
See also *post*, §§ 1939, 1941, 1943.

<sup>21</sup> *Chicago, etc. R. Co. v. Maccomb* (1890) 2 Fed. 18.

<sup>22</sup> *Newham v. Kenton* (1883) 79 Mo.

of money to it for a certificate of stock upon the fraudulent representation that it was in a flourishing condition, when in fact it was insolvent. The bill sought to hold the corporation liable, to have it wound up as insolvent, and its assets applied to the plaintiff's debt. The bill also sought an accounting and discovery. Tyler and other officers of the company were joined for purposes of discovery and because they appeared to be debtors to the company. The bill also alleged that Tyler was individually liable, but the prayer did not ask for a judgment against him. The assets of the corporation amounted to little, and after applying these to the plaintiff's claim, a personal decree was entered against Tyler for the deficiency. It was held that this was justifiable under the general prayer.

3. *Jones v. Van Doren* (1889) 130 U. S. 684, 32 L. ed. 1077, 9 Sup. Ct. 685: A widow filed her bill against her stepson and others alleging that he had fraudulently obtained from her a quitclaim to her dower interest in the lands of her deceased husband. It appeared that the stepson had conveyed the land away by mortgage, part to purchasers with notice and part to innocent purchasers for value without notice. The special prayer was that an accounting be had and that the plaintiff be allowed to redeem. It was held that under the general prayer the plaintiff could have a decree securing her dower interest in so much of the land as had not come to the hands of innocent purchasers and that as to her dower interest in the land which had reached the hands of an innocent purchaser she could have damages.

4. *English v. Fossell* (1829) 2 Pet. 505, 7 L. ed. 531: A bill was filed by a widow against trustees under a marriage settlement to compel them to invest, in bonds of the United States, a specific sum of money in their hands held for her benefit. By the will of her deceased husband, provision was made whereby if the income of said sum of money held in trust for her should fall below a particular sum, then the deficiency should be made good annually out of the general estate which was also in the hands of those trustees. A decree was entered ordering the investment as prayed, but it was held that under the prayer for general relief it was not proper to go further and order the trustees annually to make good the deficiency of income which might result from that investment. The right to have that deficiency made good arose under the will and was not asserted in the bill. It was entirely distinct from the equity of investment and could not be asserted under the general prayer. Nor was the case affected by the fact that the defendants had filed a cross bill raising the question of the deficiency, for the case made by the cross bill was distinct.

5. *Williams v. Jackson* (1882) 107 U. S. 478, 27 L. ed. 529, 2 Sup. Ct. 814: The holder of notes originally secured by a trust deed on land filed a bill to have a release of the trust deed set aside and to have the land subjected to the payment of plaintiff's note. It appeared that the release in question had been carelessly made by the trustee, but meanwhile the rights of an innocent purchaser of other notes secured by a later deed of trust on the same land had intervened. The relief sought by plaintiff against that land was denied. The plaintiff then asked for a decree for the amount of his debt against the trustee, on the ground of his personal liability incident to the negligent release of the first trust deed. It was held that such relief was inconsistent with the main purpose of the bill and could not be granted under the general prayer. The theory underlying the first relief sought was that the release was invalid. The idea underlying the other relief was that the release was valid. In one aspect the trustee was a defendant solely in his capacity as trustee. In the other view it was sought to charge him personally.

6. *Patrick v. Isenhart* (1884) 20 Fed. 339: In a bill filed by the holder of an equitable title to land, it was prayed specially that his title should be quieted and that he should be decreed to be the owner in fee simple. In its aspect as a bill *quis timet* the suit was not maintainable because the plaintiff did not have a legal title. The bill however charged facts which entitled him to a decree that the defendants were holding the legal title for his benefit and that they should convey the same to him. It was held that such a decree could be entered under the prayer for general relief.

### § 248. Principle Further Illustrated.

On a bill to restrain erections on a specified street, erections on another street will not be enjoined under the general prayer;<sup>32</sup> nor on a bill to enforce specific performance of a contract providing for the valuation of lands, will the court, under the general prayer, make a decree for a sale of the land and payment of the money.<sup>34</sup> In foreclosing a mortgage the federal courts of equity have no authority under the prayer for general relief to give personal judgment for an unsatisfied balance of the debt.<sup>35</sup> Such was the doctrine originally laid down by the supreme court, but as this did not appear to furnish a convenient working rule, the practice was changed by equity rule 92, adopted at the December Term 1863.

### § 249. Accounting Permissible under General Prayer.

Where a bill states a proper case for an accounting, one may be ordered under the general prayer though it is not specifically prayed for;<sup>36</sup> and it has been held that in a suit for an injunction against the infringement of a patent or copyright, an accounting may be had as a matter of course where the injunction is granted.<sup>37</sup>

### § 250. Effectuation of Relief Sought in Special Prayer.

Under the general prayer the court may make any order or grant any relief necessary or appropriate for the purpose of giving full effect to the orders made or relief granted under the special prayer.

<sup>32</sup> *Rainey v. Herbert* (1893) 5 C. C. A. 183, 55 Fed. 444.

<sup>34</sup> *Hobson v. McArthur* (1842) 16 Pet. 195, 10 L. ed. 934.

<sup>35</sup> *Orchard v. Hughes* (1863) 1 Wall. 73, 17 L. ed. 560; *Noonan v. Lee* (1862) 2 Black, 499, 17 L. ed. 278. The cases referred to in this note were questioned and overruled (but on another point) in *Hornbuckle v. Toombs* (1873) 18 Wall. 648, 21 L. ed. 908.

<sup>36</sup> *Watts v. Waddle* (1832) 6 Pet. 389, 8 L. ed. 437.

<sup>37</sup> *Stevens v. Gladding* (1854) 17 How. 455, 15 L. ed. 158; *Fishel v. Luettel* (1892) 53 Fed. 501; *Falk v. Lithograph Co.* (1893) 4 C. C. A. 648, 54 Fed. 894.

But where the patent has expired and the plaintiff has a complete remedy at law, the accounting will not be ordered. The accounting is only incidental to the injunction. *Root v. Railway Co.* (1881) 105 U. S. 189, 20 L. ed. 975.

*Mitchell v. Moore* (1877) 95 U. S. 587, 24 L. ed. 492: A bill was filed by the beneficiary under a trust created by a will against the trustee, the object being to establish the trust, enforce an accounting, and secure the removal of such trustee as unfaithful. The equity of the bill having been sustained, it was held that under the general prayer, the court might appoint a new trustee and order the trust funds to be turned over to him, such relief being appropriate in order to give full effect to order of removal.

### § 251. Relief Grantable in Suit for Specific Performance.

The prayer for general relief may afford a basis for specific performance of a contract where the allegations of fact in the stating part of the bill are sufficiently full and distinct. Thus, where a bill was filed against an insurance company praying that the company might be decreed to pay a loss and praying also for general relief, it appeared that the liability of the company arose out of its refusal to issue a policy covering the loss which had happened—which policy it was bound to issue in conformity with an agreement made prior to the loss. It was held that the plaintiff might have a decree granting specific performance of the agreement to insure and holding the company liable for the loss ensuing upon that agreement.<sup>38</sup>

### § 252. Relief Grantable on Bill Charging Fraud.

The rule that a plaintiff may, under the general prayer, have any relief fairly conformable with the case stated in the bill and proved by the evidence is not liberally applied in cases where fraud is the gravamen of the bill. In fact we may say that, by a special exception to the general rule, a plaintiff who bases his bill primarily on charges of fraud and who prays for special relief in respect to the fraudulent conduct of which he complains cannot, when the fraud is disproved, fall back on the general prayer and obtain relief he might otherwise be entitled to receive. The courts are very averse from permitting a bill based on charges of actual fraud to be sustained on any other ground.<sup>39</sup> A reasonable regard for the rights and reputation of the defendant who is charged with the fraud seems to be at the basis of this rule. The attitude of the courts on this point has been well expressed by Goff, J., in a case where the allegations of fraud were ill considered and out of place. Said he: "The charges of fraud have been made either under an entire misconception of the facts or with a

<sup>38</sup> *Taylor v. Insurance Co.* (1850) 9 C. 206; *Wilde v. Gibson* (1848) 1 H. L. How. 390, 13 L. ed. 187. *Cas. 626; Price v. Berrington* (1851) 7

<sup>39</sup> *Fisher v. Boody* (1852) 1 Curt. C. Eng. Law & Eq. 254.

recklessness that, at least, is not commendable, and should not be encouraged by an endeavor on the part of this court to relieve the complainants of the embarrassment caused thereby by holding that they are entitled to a decree founded on some general ground of equity jurisdiction, not specially pleaded, but supposed to be included in the prayer for general relief. While equity will always relieve those who suffer from acts of fraud, it has also always required that those who seek its jurisdiction on that account shall, after having carefully scrutinized the cause of complaint, most clearly formulate the allegations of the same, and then that they shall fully prove that which they have so alleged."<sup>40</sup>

1. *Eyre v. Potter* (1853) 15 How. 42, 14 L. ed. 592: A bill was filed by a widow to set aside a transfer by which she had parted with her rights in her husband's estate. She alleged that she had been imposed upon by her stepson and another person, and had been induced by fraud to part with her interest for an inadequate price. The case alleged was clearly one of actual fraud. It was held that under the general prayer, a decree could not be entered on proof of constructive fraud arising from the fiduciary relation of the parties. Said Mr. Justice Daniel: "Although cases of constructive fraud are equally cognizable, by a court of equity, with cases of direct or positive fraud, yet the two classes of cases would be met by a defendant in a very different manner. . . . When the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree, by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated."

2. *Spies v. Chicago etc. R. Co.* (1889) 6 L.R.A. 565, 40 Fed. 34: The bill was filed by the owner of railroad bonds who alleged that the interest on his bonds was payable, but that the officers of the company, actuated by the desire of forcing him to exchange his bonds for consol bonds, had fraudulently refused to apply income to the payment of interest, and as a device to cover up their fraud had mingled funds applicable to the interest account with the general funds of the railroad. It was held that the bill should be dismissed on proof showing that the officials of the company had acted in good faith, although it appeared that those officials had erroneously mingled the funds and that in fact a good case was otherwise made for an accounting. "Having alleged a case of fraud he cannot be permitted to support it on any other ground."

### § 253. Rule Where Fraud or Chicanery Proved.

In this connection the following qualification can, we think, be laid down with some confidence, though it has not been expressly formulated in any of the cases: If a plaintiff makes a charge of actual

<sup>40</sup> *Dashiell v. Grosvenor* (1895) 27 L.R.A. 67, 13 C. C. A. 593, 66 Fed. 334, 339.

fraud in his bill and asks for special relief on that ground but is shown not to be entitled to such special relief, he may, under the general prayer, be granted other relief adapted to the case made and developed in the record, provided he substantially proves the fraud which he charged against the defendant. Here there is no reason to be indulgent to the defendant and hence the general rule may well be applied. To prove a fraud in fact against the defendant effectually disables him from taking advantage of the exceptional favor shown to defendants who disprove the charges of fraud made against them.<sup>41</sup>

#### § 254. Prayer for Alternative Relief.

We now come to consider one of the most puzzling, not to say difficult, questions that arise in regard to the prayer for relief. It is this: When may a plaintiff properly frame his prayer so as to ask in the alternative for one or the other of two different sorts of special relief? The cases are apparently somewhat inconsistent, but the principles underlying them may possibly be stated with some degree of certainty.

The conditions under which relief may be granted under the general prayer have been set forth in the preceding pages, and it will be found that, in every case where the plaintiff has been granted relief under the general prayer, such relief is different from that sought in the special prayer. This is obviously true, for it is only where the special prayer cannot be granted, that it is necessary to fall back on the general prayer at all. It is also manifest that in every case where a plaintiff could obtain relief under the general prayer different from that specially prayed, it would be proper for his solicitor, if keen enough to foresee the exact course the litigation would take, to insert in his bill an alternative special prayer asking for that particular relief which, *ex hypothesi*, is grantable under the general prayer. The general prayer is only inserted to help over unforeseen difficulties; and if the pleader can foresee the precise conditions or contingencies under which he may need to invoke the general prayer, there is nothing to prevent him from asking in the alternative for the particular special relief contemplated as proper under those special conditions. While the foregoing suggestion gives a clue to the idea underlying the right to ask for alternative special relief, it is not to be gathered that an alternative special prayer is proper only in those cases where the relief could be given under the gen-

<sup>41</sup> Compare *Graffam v. Burgess* (1886) 117 U. S. 180, 29 L. ed. 839.

eral prayer. If this were so an alternative special prayer would never be really necessary at all, as the relief in question could always be gotten under the general prayer, a proposition that is untrue. As we have already seen, a plaintiff is required to pray specially in the first instance in all cases where the relief sought does not clearly and obviously result from the facts stated in the bill, and the same is true in regard to the alternative prayer for special relief. If the proper alternative relief is not such as results obviously from the case stated, the alternative prayer must be special, and the general prayer for "other and further relief" will not suffice. It appears then that the right to have relief under an alternative special prayer is in one aspect considerably broader than the right to have alternative relief under the general prayer. All relief granted under a general prayer is really alternative relief where there is a special prayer; but alternative relief may be granted under a special prayer for alternative relief though such relief could not be obtained under the general prayer.

#### § 255. Right to Such Relief Broader than Right to General Relief.

The following case furnishes an illustration of the situation where a party was held not to be entitled to relief under the general prayer, which relief nevertheless would have been granted if the bill had contained a prayer for alternative special relief.

1. *Hobson v. M'Arthur* (1842) 16 Pet. 195, 10 L. ed. 934: The bill sought specific performance of a contract providing for the valuation of lands by appraisers, and there was no provision in the contract for the sale of the land or payment of any money. It was held that under the general prayer the court would not order a sale and payment of money. The court observed: "If the facts would justify a prayer for any such relief, the bill should have been framed with a double aspect, so that if the court should decide against the complainant in one view of the case, it might afford him relief in another. But this bill is not so framed."

2. *Kochler v. Black River etc. Co.* (1862) 2 Black, 715, 17 L. ed. 39: A bill was filed against a corporation to foreclose a mortgage. It appeared that, by reason of the fact that the mortgage was not sealed with the corporate seal, the instrument was rendered invalid as a legal mortgage and could not be enforced. The bill was framed solely with a view to the foreclosure of the instrument as a legal mortgage. It was held that the case in this aspect having failed, the court could not give relief on the instrument considered as an equitable mortgage. [But this difficulty may be avoided at the proper juncture by amending the bill so as to add a special prayer to the effect that if the court should hold the instrument ineffective as a legal mortgage then it may be held and considered an equitable mortgage.]<sup>42</sup>

<sup>42</sup> See *Graffam v. Burgess* (1886) 117 (1885) 113 U. S. 756, 28 L. ed. 1141, 5 U. S. 180, 29 L. ed. 839; *Allis v. Jones* Sup. Ct. 771. (1891) 45 Fed. 148; *Hardin v. Boyd*

**§ 256. Principle Governing Right to Alternative Relief.**

The main principle governing the right to pray for alternative special relief may be stated as follows: The alternative relief sought must be conformable, generally, with the case made in the bill and must not be inconsistent or incompatible with the special relief primarily sought. This is substantially the same rule that applies to the granting of relief under the general prayer. Sufficient illustrations of the rule will presently be given. Meanwhile it is necessary to glance at another aspect of the matter.

If a bill prays for alternative relief it is usually said to be filed in a double aspect. By this term the fact is indicated that the bill looks towards the granting of the one or the other of the two sorts of alternative relief specified in the prayer. It is possible that a certain fine distinction might be drawn between the bill in double aspect and the ordinary bill praying alternative relief, but for all practical purposes we may say that every bill praying alternative relief is a bill in double aspect and *vice versa*. The question then as to when and under what conditions a bill may pray alternative relief resolves itself into the question as to when and under what conditions a bill may be framed in a double aspect.<sup>43</sup>

**§ 257. Plaintiff Bound by Statement of Facts as Plead.**

In order to reach the bottom of the matter we may here be allowed to refer to the circumstance that the purpose of the bill is to set forth a statement of facts which, when proved, will entitle the plaintiff to relief. The statement of facts must be borne out by the proof. A bill in equity differs entirely from a declaration at law. The declaration needs to embody only legal conclusions, and the plaintiff may ordinarily vary his allegations to make them conform to any probable state of facts he is likely to prove. He is not concluded by the recitals of his pleading in regard to points of fact. The basis of a judgment in a court of law is found primarily in the verdict of the jury. The basis of a decree in equity, on the other hand, or at least one of its bases, is found in the allegations of fact made in the bill. The plaintiff in equity is concluded by the statements of fact in the bill. As against him those facts are taken to be true.

**§ 258. Facts Stated Must Be Consistent.**

From this it inevitably follows that every bill must contain a self-consistent tale. The cause or ground of action must not be incon-

<sup>43</sup> It often happens that a bill prays a case and for another sort of relief on for one sort of relief on one branch of another branch of the case. In other Eq. Prac. Vol. I.—10.



sistent with itself. If two different and antagonistic versions of the facts are given in the bill the court will not give an attentive ear to either. Accordingly, it may be laid down that a plaintiff cannot frame his bill in a double aspect and pray for alternative relief when, in order to establish one alternative, he must in his proof contradict the very facts which for the purpose of obtaining the other relief he has already alleged to be true. We find then that a bill cannot be maintained in a double aspect where the vice of inconsistency resides in the statement of the alternative causes of action. A bill cannot be based on two substantially different cases.<sup>44</sup>

### § 259. Criterion of Right to Maintain Bill in Double Aspect.

A fairly good test at this point seems to be found in the consideration whether, if one prayer were granted, any material portion of the facts stated in support of the other prayer would be immaterial and opposed to the prayer that is granted. Could such portions of the bill be stricken out as impertinent? <sup>45</sup>

### § 260. Consistent Cumulative Grounds of Action.

The rule that a bill cannot be maintained on two substantially different and inconsistent causes of action must be interpreted reasonably. A bill may contain different grounds of action if they are merely cumulative and all point to one end. For instance, fraud, undue influence, and insanity or imbecility, are severally factors either one of which is sufficient to supply a ground of action for avoiding a deed; and in one bill the plaintiff may avail himself of all these grounds of action, for they all look to precisely the same end and they are not at all inconsistent with one another.<sup>46</sup> The following cases furnish illustrations of this principle.

1. *Davis v. Berry* (1901) 106 Fed. 761: The bill sought the cancellation of a lease executed by a corporation to a certain lessee. Two grounds of relief were set forth, first, that the president and secretary of the company who executed the

words, instead of asking for relief in one aspect or the other, the bill asks for relief in both aspects. The propriety of entertaining a bill for two or more sorts of concurrent relief is often considered in connection with the objection of multifariousness. It would seem permissible to speak of a bill asking for two sorts of concurrent relief as a bill in double aspect, but as actually used, the expression is apparently limited to situations where alternative relief is sought.

<sup>44</sup> *St. Louis, etc. R. Co. v. Terre Haute, etc. R. Co.* (1888) 33 Fed. 440; *Merriman v. Chicago, etc. R. Co.* (C. C. A.; 1894) 12 C. C. A. 275, 64 Fed. 550.

<sup>45</sup> *Cutter v. Iowa Water Co.* (1899) 98 Fed. 777.

<sup>46</sup> Story, Eq. Pl. § 254.

lease on its behalf were unauthorized, second, that the lease contained a clause of forfeiture based on certain conditions and that the lessee had failed to comply, whereby the lease had become forfeited to the company. It was held that the bill was maintainable in its double aspect and that it was therefore not objectionable as being multifarious.

2. *Dennison Mfg. Co. v. Thomas Mfg. Co.* (1899) 94 Fed. 651: A bill sought relief against one defendant on two grounds, namely, infringement of trademark and unfair competition. This was held not objectionable. Said the court: "While the bill relates to various articles and details of the business conducted by the defendant, the relief prayed is of the same kind with respect to all those articles and details and is based on substantially similar considerations. No hardship or injustice is likely to result to the defendant from the inclusion in one suit of the various matters complained of. On the other hand, to require the filing of separate bills relating respectively to the several matters set forth in the present bill would involve great expense and annoyance to both parties."<sup>47</sup>

It is in this connection that the truth is to be found in the observation once made by Mr. Justice Curtis to the effect that "the alternative case stated must be the foundation for precisely the same relief."<sup>48</sup> He was speaking of the joining of different causes of action or of putting into the bill cumulative facts all of which contribute to a single sort of relief. The observation is not applicable to the situation where on a certain statement of facts the plaintiff is allowed to pray for alternative sorts of relief.

### § 261. Both Facts and Prayers Must Be Consistent.

If the allegations of a bill are self-consistent in the sense already explained, the plaintiff may pray for alternative relief, provided the two sorts of relief prayed for are, in turn, mutually compatible and consistent. We thus learn that the vice of inconsistency may lurk in the alternative prayers as well as in the statement of the case in the bill, and in either case it is fatal.<sup>49</sup>

<sup>47</sup> Another instance of this sort of bill in double aspect is presented in a case where the plaintiff sought to enjoin a competitor from selling bookcases of a certain type on the two distinct grounds of infringement and unfair competition. *Globe-Wernicks Co. v. Fred Macey Co.* (1902) 56 C. C. A. 304, 119 Fed. 696.

In a suit to set aside a foreclosure decree, charges of fraud on the part of the trustee may be joined with allegations of invalid action on the part of the court, for both charges look to the same relief, namely, the setting aside of the decree. *Cutter v. Iowa Water Co.* (1899) 96 Fed. 780.

<sup>48</sup> *Shields v. Barrow* (1854) 17 How. 144, 15 L. ed. 162.

In line with this language is the observation often found in the cases to the effect that in the bill in double aspect the plaintiff's title to relief must be precisely the same in each event. *American Box Mach. Co. v. Crozman* (1892) 57 Fed. 1021.

<sup>49</sup> In conformity with the language of the decisions we say that the alternative prayer must be consistent, or compatible, with the primary prayer for special relief; the two prayers must not be antagonistic, so it is said. It must be confessed that the meaning of this language is not very clear, and we be-

### § 262. Alternative Prayers Founded on Successive Equities.

In a great many of the cases where it is proper to pray for alternative relief, it will be found that the two equities on which the respective prayers are based are successive equities, that is, one statement of facts is set forth which, if proved, will justify certain relief, and then another statement of facts raising another equity and justifying other relief is also set forth, there being no inconsistency between the two.<sup>60</sup>

*McGraw v. Woods* (1899) 96 Fed. 56: Land subject to a trust deed was sold by the trustee under the power of sale contained in the instrument. The beneficiary under the trust deed became purchaser, and he thereupon entered into a written contract with the prior owner and trustor and agreed to reconvey the land to him within ten days if the latter would, within that time, pay a sum equivalent to the trust debt and a stipulated bonus. The money was duly tendered in conformity with this agreement, but the purchaser refused to convey as he had promised. A bill was then filed by the trustor attacking the sale as illegal, and asking that it be set aside. The bill prayed, in the alternative, that if the court should hold the sale to be good, then the contract to reconvey should be enforced. In holding that this was a proper situation for a prayer of alternative relief, the court said: "They are not inconsistent or incompatible with each other, and they are alternative prayers founded upon the same facts, relating to the same subject-matter in controversy. It is a well-settled principle of equity that a bill may be framed with a double aspect with prayers for alternative relief, but the relief sought must be founded upon the same facts, and must be in response to the allegations of the bill."<sup>61</sup>

lieve it to be a result of a confusion of ideas. In every case where an alternative prayer is tolerated and relief granted under such prayer, there is a certain antagonism, or inconsistency, between the primary and the alternative prayer. The two are different aspects or theories of the case. We submit that the inconsistency that the law reprobates is the inconsistency that resides exclusively in the case as stated in the bill, and nowhere else. Equity evidently cares less for the plaintiff's inconsistency as to the theory of his case and less for his mistaken view as to the relief to which he is entitled than it does for an inconsistency in the facts that constitute the basis for relief. Particularly instructive on this point is *Wiggins Ferry Co. v. Ohio etc. R. Co.* (1892) 142 U. S. 396, 415, 35 L. ed. 1055, 1061.

The proposition that the prayer for alternative relief must not be inconsis-

ent with the primary special prayer is dangerously near being a contradiction in terms.

<sup>60</sup> Compare *Jahn v. Champagne Lumber Co.* (1906) 147 Fed. 631.

<sup>61</sup> See *Shields v. Barrow* (1854) 17 How. 130, 15 L. ed. 158; *Hardin v. Boyd* (1884) 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. 771; *Maynard v. Tilden* (1886) 28 Fed. 703; *Fisher v. Moog* (1899) 39 Fed. 667.

Where a bill sets forth a good cause of action for the specific performance of a contract for the conveyance of realty, but it yet appears that specific performance cannot be obtained because the defendant has disabled himself from performing by selling the property to another, it is proper for the prayer to ask for a money judgment for the damages, the other alternative being out of the question. *Townsend v. Vanderwerker* (1895) 160 U. S. 171, 16 Sup. Ct. 258, 40 L. ed. 383.

### § 263. Secondary Relief Granted Where Principal Relief Denied.

A party who seeks to avoid a liability or set aside a conveyance may sometimes pray in the alternative that if the principal relief is denied he may yet have a decree adjudicating his rights in other respects.<sup>52</sup>

1. *Virginia Carolina etc. Co. v. Home Ins. Co.* (C. C. A.; 1902) 51 C. C. A. 21, 113 Fed. 1: A bill was filed by insurance companies to secure an injunction against actions at law on several fire policies. The ground alleged for relief was that the policies were procured by fraud. There was an alternative prayer that, in the event the companies should be found to be liable on the policies, the extent of their several liability should be determined and the loss apportioned. It was held that this was a proper case for giving the bill a double aspect.

2. *Ritchie v. Sayers* (1900) 100 Fed. 520: A bill was filed to set aside a conveyance of land under attachment proceedings and also to set aside a conveyance of the same land under a tax sale, on the ground of irregularities in the sales. The conveyances in question covered only an undivided interest in the land; and it was prayed in the alternative that if the court should adjudge those conveyances to be good, then a partition of the same should be granted and the plaintiff's part set aside to him in severalty. It was held to be a proper situation for the alternative prayer.

3. *Fisher v. Moog* (1899) 39 Fed. 665: A creditors' bill sought to have a conveyance of property by the debtor set aside as illegal and fraudulent. It was alleged that the conveyance in question was either altogether fictitious and simulated or was voluntary and not supported by a consideration. It was also alleged that at most the grantee was merely holding the property as security for his debt, which was less than the recited consideration. It was prayed that the conveyance be set aside and that the property be sold to the end that its proceeds might be applied to the payment of any just claim of the grantee and then to the payment of the plaintiff's debt; or, if the conveyance was found to be entirely without consideration, that then the whole of the proceeds should be applied to the claims of the various creditors. It was held that the special prayer was sufficiently certain and consistent and that the desired relief could properly be given under it, and if not under it, then under the general prayer.

4. *D. A. Tompkins Co. v. Monticello Cotton Oil Co.* (1905) 137 Fed. 625. The vendor of machinery intended for use in a factory filed a bill to recover the unpaid purchase money and for equitable relief in one of three alternative aspects, as follows: (1) He alleged that the debt was secured by the statutory materialman's and contractor's liens and prayed that such liens be enforced. (2) He also alleged that the contract for the sale of the machinery was a conditional sale, and in this aspect prayed that the machinery might be restored

<sup>52</sup> In *Rigney v. De Graw* (1900) 100 Fed. 213, a bill was maintained in the event the trust deed should be held to be binding. The case was reversed on another ground in *Stout v. Rigney* (1901) 107 Fed. 546. The case was reversed on the ground of the insanity of the grantor,

to him. (3) He averred that the contract might possibly be treated as an equitable mortgage, in which aspect the court was asked to foreclose the same. Relief was granted in this aspect of the case.

**§ 264. Multifariousness as Affecting Right to Secondary or Alternative Relief.**

The application of the rule stated in the preceding section is subject to be controlled by the considerations applied in regard to multifariousness generally; and if it appears that to entertain the suit, as presented in double aspect, would be inconvenient and involve a confusion of different rights of action, the bill cannot be maintained.<sup>53</sup>

• **§ 265. Discretion of Court as to Granting Alternative Relief.**

It is not unimportant to add, in this connection, that sooner or later the principle will be recognized that the power of the court to entertain a bill in double aspect is largely a matter of judicial discretion. This problem in fact presents an aspect of the broader question of multifariousness, and must be determined on the same considerations and principles. We shall learn in the discussion of multifariousness that in its ultimate analysis the law on this subject is dependent on considerations of convenience and discretion. The principle already worked out in regard to multifariousness must also be applied in regard to the matter of the filing of a bill in double aspect. We suggest further that just as the tendency in regard to multifariousness is constantly towards liberality, so in connection with the bill in double aspect we find the later decisions evincing a broader and more liberal attitude. The decisions and especially the dicta of the supreme court fifty years ago are decidedly more close and rigorous than the present practice of the federal courts. The earlier cases go upon the idea that there is some unbending criterion by which to determine in every case whether a bill may be maintained in double aspect. As long as this idea prevailed the rule, or supposed rule, in regard to bills in double aspect was broadly stated as being of universal application. But as the fact is recognized that the matter is, after all, largely one of discretion, this attitude will be changed. And it is being changed now. It is not surprising that at this juncture the cases should be somewhat discordant.

<sup>53</sup> *St. Louis, etc. R. Co. v. Terre A.*; 1894) 12 C. C. A. 275, 29 U. S. App. Haute, etc. R. Co. (1888) 33 Fed. 440; 428, 64 Fed. 550; *Cutter v. Iowa Water* *Merriman v. Chicago, etc. R. Co.* (C. C. Co. (1899) 96 Fed. 777.

## § 266. General Conclusion.

From what has been said the general conclusion is to be drawn that a bill may be framed in double aspect and alternative relief prayed, if the case made in the bill is consistent with itself and the alternative special prayer is also compatible with the primary special prayer; and the question as to when the case is thus consistent and the prayers are thus compatible is a matter largely of judicial discretion to be determined on considerations of propriety and convenience.

## § 267. Exception Where Bill Charges Fraud as Gravamen of Action.

To this rule there is one exception, or perhaps it may be more accurately said, there is one class of cases wherein the courts will absolutely refuse, as a matter of discretion, to allow the bill to be maintained in double aspect. The cases referred to are those in which the bill charges fraud or imposition and relief in one aspect is sought expressly on this ground. Here the court will not permit the plaintiff, when he has failed to prove the charge of fraud or imposition, to obtain relief on some other aspect of the case. This rule is no doubt based on the same consideration that underlies the refusal of the court to grant relief under the general prayer in such cases.<sup>53</sup> We are bound to add that the rule here stated is not clearly brought out in the authorities, but it appears to be a just one; and as it tends to reconcile the cases, it is advanced for what it may be worth. Its chief support is found in the analogous rule which denies relief under the general prayer when the charge of fraud is disproved.<sup>54</sup>

1. *Shields v. Barrow* (1854) 17 How. 130, 144, 15 L. ed. 159, 162: In a bill filed to secure the rescission of a contract for the sale of land on the ground of imposition and for other causes, an alternative prayer cannot be joined to the effect that, if the court should find that the contract is valid, then and in such event specific performance may be granted.<sup>55</sup>

2. *Cella v. Brown* (C. C. A.; 1906) 75 C. C. A. 606, 144 Fed. 742, 755: In a

<sup>53</sup> See *ante*, § 253.

<sup>54</sup> *Eyre v. Potter* (1853) 15 How. 42, 14 L. ed. 502; *Spies v. Chicago, etc. R. Co.* (1889) 6 L.R.A. 565, 40 Fed. 34. In *Hardin v. Boyd* (1834) 113 U. S. 704, 23 L. ed. 1143.

<sup>55</sup> The court did not expressly base its decision in this case on the ground that the bill charged fraud, but on a general principle which appears to have been too broadly stated by the court. The modern tendency appears to be to break away from the broad rule there stated, and consequently the decision is now best supported on the narrower ground stated by us, or on the ground pointed out by the supreme court itself in *Hardin v. Boyd* (1834) 113 U. S. 704, 23 L. ed. 1143. The broad rule stated in *Shields v. Barrow* has caused some trouble. In *St. Louis etc. R. Co. v. Terre Haute etc. R. Co.* (1888) 33 Fed. 440, it was applied erroneously, so it appears to us, to a case where fraud was not alleged at all. In this latter case the bill could well have been entertained consistently with good authorities.

bill filed to enforce rights growing out of and dependent upon the existence of a consummated reorganization of two railroad companies, it is not permissible to join a prayer in the alternative seeking to impeach the whole reorganization scheme as fraudulent and invalid.

**§ 268. If Fraud Proved Plaintiff May Have Alternative Relief.**

The rule that disables a plaintiff who seeks relief on the ground of fraud from maintaining his bill on any other ground applies only where the charge of fraud is disproved. If the charge of fraud is substantially made out and yet, for some reason or other, the plaintiff is not entitled to the particular primary relief sought in respect to the fraud, he may obtain relief under an alternative prayer not based on the charge of fraud. Furthermore, if the plaintiff has failed to insert the alternative prayer in his original bill, he may be permitted to amend at the hearing so as to include such a prayer.<sup>66</sup>

**§ 269. Right to Alternative Relief as Affected by Parties.**

The right to maintain a bill in double aspect is sometimes dependent on a consideration of the question of parties. If the necessary parties are different in the two aspects of the bill it cannot be maintained, so it has been held;<sup>67</sup> but possibly this rule may not be universally applicable.

**§ 270. Striking Out or Waiving Alternative Prayer.**

Where a bill in double aspect is not maintainable as such, by reason of a diversity of the parties in the two aspects, but is maintainable in either aspect separately, the court will require the plaintiff to elect and amend by striking out the prayer for one relief or the other. Even though no question is raised by the adverse party, the court of its own motion will see that the litigation is put in form to be disposed of understandingly. Moreover if it appears that the defendant, without objection from the plaintiff, has treated the bill as being in only one aspect, this construction may be adopted by the court and the other aspect of the bill ignored without any order or amendment at all.<sup>68</sup>

<sup>66</sup> *Hardin v. Boyd* (1884) 113 U. S. 750, 28 L. ed. 1141; *Graffam v. Burgess* (1892) 57 Fed. 1025.  
(1885) 117 U. S. 180, 29 L. ed. 839.

<sup>67</sup> *American Box Mach. Co. v. Crossman* (1892) 57 Fed. 1021.

*Prayer for Process.*

## § 271. Prayer for Process of Subpoena.

The last formal part of the bill is the prayer for process, process being necessary in order that the defendant should be brought into court. In the early history of equity procedure the prayer for process seems to have been considered more important than the prayer for relief; and in specimens of the early bills it will be found that the prayer for process usually precedes the prayer for relief.<sup>59</sup> In modern times the sequence of the prayers for process and for relief somehow became changed, and in the form books the prayer for relief is usually inserted in the bill before the prayer for process.

The proper process of the court of equity for compelling the defendant to appear and answer the bill is a writ of subpoena,<sup>60</sup> and every bill should conclude with a prayer that such process may issue against the defendant to compel him to appear and answer the bill and to abide by, and perform, the decree of the court.

Absence of a prayer for process renders the bill defective, and it is perhaps subject to demurrer on this account. We incline to the opinion, however, that the more proper way in which to raise this question would be by motion to dismiss the bill for lack of the requisite formality.<sup>61</sup> By answering and going to a hearing on the merits a defendant waives the want of a prayer for process.<sup>62</sup>

<sup>59</sup> This is the usual order of the prayers in the early bills, as may be seen by reference to Baidon's *Select Cases in Chancery*, *passim*. The following prayer at the end of an early bill is perhaps typical: "May it please your most reverend Paternity and most gracious Lordship, in consideration of what is said, and to the end that the said John may not through his good nature be undone, which God forbid, to cause by your writ the said Phillip to come before you in the Chancery on a certain day to come, and there to hear and see the writings and other evidences to be shown in this behalf by the said suppliant, and to examine the said Phillip in this behalf, and thereupon to do the fulfilment of justice to the parties, for God and in way of charity." *Selden Society, Select Cases in Chan.*, No. 95, p. 89.

But the prayer for relief was often quite specific: "Wherefore may it please your most gracious Lordship to grant

a writ to cause the said William to come before you in the Chancery of our Lord the King to be there examined touching the matter, and moreover graciously to ordain that the said John Bernard may be restored to his benefice, so that he be not so deprived of his livelihood, for God and in way of charity." *Selden Society, Select Cases in Chan.*, No. 56, p. 59.

Sometimes the prayer was merely for a general remedy without mentioning any writ, but the writ issued just as if it had been specially prayed for. Sometimes the prayer was merely for a writ without reference to the remedy, it being supposed that when the party should be gotten into court the right remedy would be devised. *Selden Society, Select Cases in Chan.*, xiv.

<sup>60</sup> Equity rule 7.

<sup>61</sup> See *Jeunes v. Landes* (1897) 84 Fed. 73.

<sup>62</sup> See *Seges v. Thomas* (1863) 3 Blatchf. 11, Fed. Cas. No. 12,633.



### § 272. Naming of Defendants.

The prayer for process must mention the name of the defendant, or, if there are more than one, the names of all of them. This enumeration of the defendants should be in conformity with the enumeration given in the introductory part of the bill.<sup>63</sup>

The naming of the defendant, or defendants, in the prayer for process is an important feature of the prayer. It is required not only by equity rule 23 but also by the settled practice of the English chancery. Indeed, under the English practice, it was the naming of the defendant in the prayer for process rather than in the introductory part of the bill that really made him a defendant in the suit. As was once quaintly said by Lord Chancellor Parker, "the plaintiff may complain and tell stories of whom he pleases, but they only are defendants against whom process is prayed."<sup>64</sup> The mere naming of a party as defendant in the bill without praying process against him does not make him a defendant,<sup>65</sup> unless, of course, he appears and submits to the authority of the court. Even though a person is out of the jurisdiction of the court, his name should appear as a defendant in the prayer for process as well as in the introduction, for perchance he may come within the jurisdiction where process may be served on him.<sup>66</sup>

The failure to specify the names of the defendants in the prayer for process renders the bill defective, and there is authority to the effect that such a bill is demurrable.<sup>67</sup> But this is very doubtful. We would say that the defect is purely one of form, and should be taken advantage of by motion to dismiss. Certainly the court may, when its attention is directed to the matter, direct the bill to be amended in this respect, and it sometimes will even do so on its own motion.<sup>68</sup>

It has been held—and in our judgment properly held—that where the defendants who are required to answer are named and plainly designated in the body of the bill, a demurrer based on the ground that they are not named in the prayer for process or that the bill has no prayer for process at all will not lie.<sup>69</sup> The equity rule requir-

<sup>63</sup> Equity rule 23.

<sup>64</sup> *City of Carlsbad v. Tibbette* (1892)

<sup>65</sup> *Fawkes v. Pratt* (1719) 1 P. Wms. 51 Fed. 855.

593.

<sup>66</sup> *Jenness v. Landen* (1897) 84 Fed. 73.

<sup>67</sup> 1 Dan. Ch. Pr. 500.

See *United States v. Agler* (1894) 62

<sup>68</sup> 1 Dan. Ch. Pr. 500; Equity rule 22.

Fed. 824.

<sup>69</sup> *Goebel v. Am. Railway etc. Co.*

(1893) 55 Fed. 826.

ing the names of the defendants to be inserted in the prayer for process is to be followed because it is a rule, and a proper rule, but that a failure to comply with it is grave enough to justify sustaining a demurrer solely on that ground cannot be admitted. Under the equity rules, a subpoena from a federal court of equity issues as of course,<sup>70</sup> and when it is once issued against a defendant named in the introduction or in the body of the bill, it must be considered valid process. It is essential that the defendants should be clearly designated as such; but it cannot be material, so far as the validity of the process is concerned, whether they are designated by praying process against them in the usual form or by any positive allegation in the bill that they are impleaded as defendants.<sup>71</sup> Certainly, a decree will not be set aside, as against a particular defendant, merely because his name was not mentioned in the prayer for process, where he was otherwise named as a defendant in the bill, and process was duly issued and served on him. The rule requiring that the prayer for process shall contain the names of all the defendants mentioned in the introductory part of the bill can only be treated as a formality.<sup>72</sup> A general appearance has been held to operate as a waiver of the objection that a defendant was not named in the prayer for subpoena.<sup>73</sup>

### § 273. Statement of Defendant's Minority.

If one of the defendants is known to be under age or otherwise under guardianship, this circumstance should be mentioned in the prayer for process, so that the court may be advised of the matter and may make such orders or take such steps, on the return of the process, as may be necessary to protect him.<sup>74</sup>

### § 274. Defendant Formerly Required to Answer on Oath.

In the prayer for process it used to be customary for the plaintiff to pray that the defendant should be required to answer the bill on oath; and formerly every answer had to be under oath whether the plaintiff expressly called for the oath or not, unless upon consent of the parties the court made an order dispensing with the oath.<sup>75</sup>

<sup>70</sup> Equity rule 12.

<sup>72</sup> *Buerk v. Imhaeuser* (1881) 8 Fed.

<sup>71</sup> See *Elmendorf v. Delancey* (1825) 457.

<sup>1</sup> *Hopk. Ch.* 555.

<sup>74</sup> Equity rule 23.

<sup>73</sup> *Cornell v. Green* (1897) 88 Fed.

<sup>75</sup> 2 *Dan. Ch. Pr.* 271.

821, 823, *affirmed* (C. C. A.; 1899) 37 C. C. A. 85, 95 Fed. 334.

**§ 275. Plaintiff Now Permitted to Waive Oath.**

At the December Term 1871, the supreme court, by an amendment to equity rule 41, made an innovation in the former practice, and established the present rule that the plaintiff may, in his bill, expressly waive the defendant's oath. This waiver should be expressed, in the prayer for process, by asking that the defendant be required to answer the allegations of the bill, "but not under oath, the oath being waived."

This privilege of waiving the oath extends to the whole of the answer or to such interrogatories only as the plaintiff is pleased to specify; and furthermore, the oath may be waived as to one respondent and not as to another. The effect of waiving the oath is not to deprive the defendant of the right to swear to his answer if he sees fit, for this he may still do,<sup>76</sup> but it does deprive him of the benefit of the answer as evidence at the hearing on the merits.

The waiver of the defendant's oath to the answer may be put in the form of a foot-note memorandum accompanying the bill or interrogatories, such memorandum naming the parties as to whom the oath is waived. In a case where this is done the waiver of oath will extend to a new defendant added by amendment, provided the original foot-note memorandum is also amended by including his name.<sup>77</sup>

<sup>76</sup> *Woodruff v. Dubuque, etc. R. Co.* (1887) 30 Fed. 23.    <sup>77</sup> *Fisher v. Moog* (1889) 39 Fed. 665.

## CHAPTER VI.

### BILL IN EQUITY (*continued*).

#### *Documents and Exhibits.*

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*Documents and Exhibits.***§ 276. Pleading of Documents and Their Contents.**

It frequently happens that facts necessary to make out the plaintiff's case are contained in written instruments, papers, documents, deeds, and records; and sometimes written instruments, papers, documents, deeds, or records are the very foundation of the suit. The question arises as to the mode in which these, or their contents, are to be pleaded in the bill. The first principle to be borne in mind is that good pleading requires that everything material to the case should be set forth in the bill by proper averments. The body of the bill should contain the substance of the case. "It is always necessary in drawing bills to state the case of the plaintiff clearly, though succinctly, upon the record."<sup>1</sup> Now it is obvious that different situations may well be dealt with in different ways by the pleader. He may set out the instrument, document, or record *in extenso* in the body of his bill, or he may set out its substance, or he may set it out more generally and attach the instrument or document, or a copy, as an exhibit to his bill, referring to such exhibit and incorporating it in his bill by reference.

**§ 277. Generally Only Substance of Documents to Be Stated.**

The general rule of correct pleading is that only the substance of documents should be stated in the bill, and they should not be set out *in extenso* unless this is necessary to convey a proper conception of the exact nature of the cause of action. One of Lord Coventry's orders runs to the effect that bills, answers, and replications shall not be stuffed with repetitions of deeds or writings *in hæc verba*, but the effect and substance of only so much of them as is pertinent and material shall be stated and that in brief and effectual terms.<sup>2</sup> This rule is substantially incorporated in the equity rules as follows:

Equity Rule 26: Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, *in hæc verba*.

**§ 278. Documents Pledged According to Legal Effect.**

Therefore, as a general rule, the contents of deeds, documents, and other written instruments, so far as material, should be set forth in substance according to their legal effect as in pleadings at

<sup>1</sup> 1 Dan. Ch. Pr. 476.

<sup>2</sup> Beames Orders in Cham. 27, 70, 166.

law rather than according to the exact form of the words.<sup>3</sup> But the equity rule is not to be so construed as to countenance bills that are lacking in such fullness and detail of statement as will be sufficient fairly to apprise the defendant of the precise nature of the cause of action.<sup>4</sup> Where a plain, clear, and concise statement of the character and substance of pertinent documents would be sufficient in a bill, it is bad pleading to set them out at length. But if the facts appearing in the document are necessary to maintain the suit and those facts are not otherwise set out, they cannot be wholly expunged.<sup>5</sup> Any unnecessary recital of a contract *in hæc verba* in the bill is a violation of the equity rule.<sup>6</sup>

### § 279. When Documents to Be Set Out in Full.

Cases arise in which it is convenient and highly proper to set out a document or instrument in full. This occurs whenever any question in the cause is likely to turn on the precise words of the instrument, as in the case of a bill filed to obtain the court's construction of a will that is informally or inartificially worded;<sup>7</sup> or, perhaps, in the case of a bill filed to obtain a cancellation or rescission of a contract, deed, or conveyance. Indeed, it would seem to be proper to set out the whole document in all cases where it is the real basis of the suit; certainly so if the pleader finds that he cannot easily frame a succinct and solid statement of its contents. The rule forbidding the setting out of documents *in hæc verba* as formulated by Lord Coventry is directed primarily against "vain repetitions" of deeds and writings, and the equity rule referred to merely reprobates "unnecessary recitals." Wherever the setting out of the contents of a document in full is conducive to accuracy and is not too far objectionable on the ground of prolixity, the document may well be pleaded *in extenso*. The objection to the recital of documents in full pertains rather to the recital of evidence than to the recital of documents constituting the basis of the suit. If agreements that are the subject of a suit are ambiguous, they may be set forth in full together with the interpretation that the plaintiff thinks they should bear.<sup>8</sup>

### § 280. Exhibit Unnecessary if Contents Plead.

If the pleader sufficiently sets forth the contents of a document to make out his case, it is not necessary to attach the document to his

<sup>3</sup> 1 Dan. Ch. Pr. 468, 469.

<sup>4</sup> *Electrolibration Co. v. Jackson* (1892) 52 Fed. 773.

<sup>5</sup> *Nevada Nickel Syndicate v. National Nickel Co.* (1898) 86 Fed. 493.

<sup>6</sup> *Board of Trade v. Nat. Board* (1907) 154 Fed. 238.

<sup>7</sup> 1 Dan. Ch. Pr. 468.

<sup>8</sup> *Einstein v. Schnebly* (1896) 89 Fed. 840.

bill as an exhibit. He should merely produce and prove it at the proper juncture before or at the hearing as evidence in his favor. Indeed in view of equity rule 26, which disapproves of the unnecessary copying of deeds, contracts, and other documents, it may be said generally that no documents or copies of documents need be filed as an exhibit to any bill, provided the cause of action is otherwise sufficiently set forth.<sup>9</sup> But every document that is essential to make out the plaintiff's case should be made an exhibit, unless its terms are already actually recited in the bill.<sup>10</sup>

### § 281. Exhibit Considered Part of Bill.

If an exhibit is properly referred to and filed as such it becomes and is considered a part of the bill.<sup>11</sup> The purpose of filing a document as an exhibit is to incorporate it in the bill by reference. This avoids such disfiguration of the bill as would result from setting out the document in the bill in full. Making an exhibit of a document enables the pleader to state its contents in a vaguer and more general way in the body of the bill than would otherwise be necessary. In order to become a part of the bill and be treated as being incorporated in it, the exhibit must be referred to in explicit terms and filed as an exhibit.

*Partes v. Thomas* (1882) 11 Fed. 700: In a bill to declare and execute the trusts of a will it was alleged that one P. was appointed trustee by the chancery court on the resignation of the trustees named in the will. The plaintiff promised in the bill to file a certified copy of the record on or before the hearing, but did not make such record an exhibit to the bill. There was used by both sides at the argument of a demurrer a certified copy of the decree, but it seemed not to have been filed. It was held that this decree could not be considered as any part of the bill and hence could not be looked to on the question raised by the demurrer.

### § 282. Incorporation of Other Bill by Reference.

The allegations and statements of another bill are incorporated by reference in a bill which specifically prays that such other bill may be taken as a part of the present bill. In such case the allegations incorporated by reference must be answered.<sup>12</sup>

<sup>9</sup> *Putnam v. New Albany* (1869) 4 715, Fed. Cas. No. 13,629; *Byers v. Surget* (1856) 19 How. 303, 15 L. ed. 670.

<sup>10</sup> *Marshall v. Turnbull* (1883) 84 13 Mason v. Jones (1848) 1 Hayw. 272, 329 Fed. Cas. No. 9,240.

<sup>12</sup> *Surget v. Byers* (1845) 11empt.

## § 283. Exhibit Best Evidence of Contents of Document.

If there is an inconsistency between the averments of a bill in regard to the contents of a document and the document itself as exhibited, the latter must of course control, as it is the best evidence of its own contents.<sup>13</sup> Where the allegations of a bill are quite general and somewhat vague, the more specific facts shown by the accompanying exhibits will be construed as qualifying more general allegations of the bill.<sup>14</sup>

## § 284. Recitals of Document Presumed Correct.

Where the document on which a suit is founded is not made a part of the bill, but its general terms and legal effect are set out and the plaintiff signifies a readiness to produce the same, it will be assumed as against one who demurs without requiring production, that the statement made in the bill is a correct statement of the terms of that instrument.<sup>15</sup>

## § 285. Record and Documents Remain in Clerk's Office.

The papers, documents, and books constituting the record in the cause should not be allowed to be taken from the clerk's office by any person, unless upon order of the court or one of its judges. But office copies can be had by any party to the cause applying for the same.<sup>16</sup>

*Interpretation of the Bill.*

## § 286. Principle of Construction.

By what principle is a court to be guided in construing and interpreting the allegations of a bill? It is familiar learning that in construing common-law pleadings every fair intendment is drawn against the pleader. *Ambiguum placitum interpretari debet contra proferentem*. We do not discover that this rule of interpretation is

<sup>13</sup> Greig v. Russell (1886) 115 Ill. 484; National Park Bank v. Halle (1889) 30 Ill. App. 17; Dreyer v. Golby (1895) 62 Ill. App. 347; Lockhead v. Berkeley Springs etc. Co. (1895) 40 W. Va. 553. Repugnancy between the averments of a bill and an exhibit may render the bill subject to demurrer. Barrett v. Central Bldg. etc. Assn. (1900) 130 Ala. 294, 30 So. 347.

<sup>14</sup> Willard v. Davis (1903) 122 Fed. 363.

<sup>15</sup> New England etc. Co. v. Edison (1901) 110 Fed. 20.

Eq. Prac. Vol. I.—11.

<sup>16</sup> See No. 24 of Rules of Circuit Court of First Circuit.

No document or paper filed in any cause and referred to in the pleadings, or properly constituting a portion of the record, shall be withdrawn without leave of court, and then a certified copy shall be retained at the expense of the party withdrawing the original. No. 29 of Rules of Circuit Court for E. D. Louisiana,



followed in dealing with the allegations of a bill, and it is probable that on principle there should be a difference. Pleadings at common law are so drawn as to state the legal effect of the facts on which the cause of action is founded, while in equity the bill is a statement of the facts, not a statement of the legal effect of those facts. At any rate, whatever the reason may be, the allegations of the bill are construed more liberally in favor of the plaintiff than pleadings at law. We do indeed find dicta to the effect that the bill should be construed most strongly against the plaintiff; and possibly a distinction might be pointed out between, on the one hand, the construction of the bill considered as a whole, that is, with regard to the type of the bill and the nature of the equitable right involved, and, on the other hand, the interpretation of particular ambiguous allegations in the bill. It is certain that in respect to the larger features of the bill, it will be liberally construed so as to give effect to any real equity involved in the case. As to inherently ambiguous clauses and allegations it may be conceded that the court cannot be so liberal.

#### § 287. Bill Interpreted So as to Harmonize Allegations.

A bill that states a complicated cause of action is often found to present different aspects, and it is sometimes difficult to determine with certainty the exact nature of the bill. Thus, in the case referred to below, it was questionable whether, from the nature of the allegations and relief sought, the bill should be treated as a pure creditors' bill or as a bill to redeem property from a foreclosure sale.<sup>17</sup> In solving this question, the court declared the principle of construction to be this, namely, that the particular construction ought to be given to the bill that appears best to harmonize with its apparent scope and purpose and which will not lay it open to the charge of stating antagonistic and conflicting grounds of relief. Nor, if practicable, will that construction be placed upon a bill which would render the greater part of its allegations irrelevant and immaterial and require the rejection of those allegations as surplusage.

#### § 288. Interpretation to Save Equity of Bill.

If a bill can be viewed either as one sort of a bill or another, the courts will adopt that view of it which best justifies the relief to which the plaintiff is entitled. The appellate court will incline to

<sup>17</sup> *Merriman v. Chicago etc. R. Co.* (1894) 12 C. C. A. 275, 44 Fed. 526.

accede to the view of the case taken in the court below, if that view appears to be conducive to the ends of justice.

*Briggs v. Sperry* (1877) 95 U. S. 401, 24 L. ed. 290: The bill was primarily framed with a view to the dissolution of a partnership, a settlement of the partnership affairs, a sale of the partnership property, and a distribution of its proceeds. In another aspect the bill could be treated as a bill for the partition of land. One species of relief granted by the lower court was an order for the held upon appeal that inasmuch as the bill could be viewed in the light of a partition bill as well as a bill for dissolution, this relief could be justified.

### § 289. Interpretation to Save Jurisdiction of Court.

A bill framed with an immediate eye to relief under insolvency laws but containing all the allegations necessary to a valid decree of foreclosure will be treated as a bill to foreclose where this aspect of the suit is the only one in which the jurisdiction of the court can be upheld.<sup>18</sup>

### § 290. Ambiguous Allegations Construed against Pleader.

On the other hand, if an averment of particular facts essential to support the equity of the bill in any aspect is inherently ambiguous and equally capable of two interpretations one of which is less favorable to the pleader than the other, the less favorable interpretation must be adopted, so it is said.<sup>19</sup> But admitting this principle to be correct, it cannot be so applied as to justify the defendant in drawing inferences inconsistent with the averments of the bill, merely because such inferences are possible.<sup>20</sup> Nor can it be so applied as to defeat a bill on the ground that a fact necessary to support the bill appears by implication only. If an essential fact appears by fair and reasonable implication the bill will stand, at least as against a general demurrer.<sup>21</sup> In other words, the rule that an inherently ambiguous allegation must be construed against the plaintiff does not apply where the allegation is not really and properly susceptible of a double meaning.<sup>22</sup>

<sup>18</sup> *Carling v. Seymour Lumber Co.* (C. C. A.; 1902) 113 Fed. 483, 51 C. C. & H. 23. A. 1, reversing *In re Macon etc. Lumber Co.* (1901) 112 Fed. 323.

<sup>19</sup> *Investor Co. v. Dobinson* (1896) 72 Fed. 603; *Simpson v. Fogo* (1890) 1 Johns. & H. 23.

<sup>20</sup> *Simpson v. Fogo* (1890) 1 Johns. & H. 23.

<sup>21</sup> *Amestoy v. Transit Co.* (1892) 95 Cal. 314.

<sup>22</sup> *Investor Pub. Co. v. Dobinson* (1896) 72 Fed. 603. Compare *Union Pac. R. Co. v. Meier* (1896) 28 Fed. 9.

*Scandal and Impertinence in Bills.***§ 291. Impertinent Allegations.**

While, as we have seen, nothing should be omitted from the stating part of the bill that is really essential to sustain the case, it is also desirable that nothing should be averred that is not necessary. Such matter should be left out as irrelevant and impertinent. The test of the sufficiency of the averments of a bill may be stated in this form: Would the plaintiff be entitled to the special relief he prays or, under the general prayer, to any relief, if all the averments of the bill should be established by proof? If so, the bill is maintainable. A test of the immateriality of a particular averment is: Can the bill be fully sustained as to the relief sought, if the averment is not proved? If so, the averment is immaterial, irrelevant, and impertinent.<sup>23</sup> Impertinence consists in the introduction of matter into a bill, answer, or other pleading, which matter is not properly before the court for decision in any particular stage of the suit.<sup>24</sup> It is much the same sort of fault in equity pleading as that which in common-law pleading is denominated surplusage. The most objectionable form of impertinence is that which consists of scandalous and libelous matter. This matter is more particularly obnoxious where the harmful allegations concern persons not connected with the suit.<sup>25</sup> If a bill contains irrelevant, libelous, and scandalous matter against a third person not a party to the suit, the bill may be stricken from the file and suppressed.<sup>26</sup> And doubtless a motion or suggestion to this purpose could be made by the stranger thus injuriously affected, or the court could take notice of the objectionable matter of its own accord.

**§ 292. Impertinence and Prolivity Distinguished.**

Mere prolixity and redundancy of expression in detailing relevant facts does not constitute impertinence in the legal sense, because impertinence refers to the statement of matters that have no proper bearing on the issues of the case. Hence specific allegations in a bill which have such a legal bearing on a case that the facts stated would be admissible as evidence at the trial will not be ruled out as impertinent, although the bill may be subject to criticism in respect

<sup>23</sup> See Gibson, *Suits in Cham.*, 2d ed. § 140.

<sup>24</sup> *Blanton v. Chalmers* (1908) 158 Fed. 907.

<sup>25</sup> *Polk v. Mutual Reserve etc. Assn.* (1904) 128 Fed. 524.

<sup>26</sup> No. 53, Lord Bacon's Ordinances.

of stating matters of evidence with unnecessary particularity.<sup>27</sup> Nor does the fact that pertinent documents are set out *in hæc verba*, when a statement of their contents would have sufficed, justify striking them out as impertinent. But if pertinent documents are copied more than once in a bill, the repetitions may be expunged.<sup>28</sup>

Rambling and tautological pleadings are, of course, highly objectionable, however relevant the matters stated in such pleadings may be, and a court may sometimes feel constrained to protect itself from prolix pleadings by ordering the plaintiff to plead more concisely. A court of equity has inherent power to do this.<sup>29</sup> Prolixity and verbosity may, indeed, afford ground for striking the whole bill from the file, but where the objectionable matter can be expunged and still leave sufficient matter in the bill to support its equity, the defect of impertinence will be remedied and the bill, as pruned down, will be permitted to stand.<sup>30</sup>

#### § 293. Attitude of Courts as Regards Impertinent Allegations.

Courts are naturally not particularly keen to strike out matter from a bill on the ground of impertinence, for it is often hard to say just what may or may not be material. The pleader naturally prefers to err in the fullness rather than in the paucity of his allegations; and where the bill is intelligently framed the court will not cause matter to be stricken unless its impertinence is clearly manifest. A mistake resulting from too great strictness on this point might be followed by serious consequences; and it is deemed better to be liberal. This is especially true in cases involving the application of principles to new and important situations. Thus, in a case where an express company sought to compel common carriers to convey its express packages, the bill contained a rather full statement of the history of the express company giving an account of its origin, growth, importance, the extent of its business, and its relations with the transportation companies. An objection to the matter on the ground of impertinence was overruled. And it was further held not to be objectionable to state in the bill facts of which the court might take judicial knowledge, the idea being that thereby all the facts and considerations which were proper to that case might be brought to the attention of the court.<sup>31</sup>

<sup>27</sup> *United States v. Hyde* (1906) 145 Fed. 393.

<sup>28</sup> *Nevada Nickel Syndicate v. National Nickel Co.* (1898) 86 Fed. 496.

<sup>29</sup> *Kelley v. Boettcher* (C. C. A.; 1898) 29 C. C. A. 14, 85 Fed. 55.

<sup>30</sup> *Polk v. Mutual etc. Assn.* (1904) 128 Fed. 524.

<sup>31</sup> *Wells v. Oregon etc. Co.* (1883) 15 Fed. 581.

*Exceptions for Impertinence and Scandal.***§ 294. Time for Taking Exceptions for Impertinence.**

If the bill contains impertinent, immaterial, or scandalous allegations, objection must be taken to the bill on this ground in the very first stages of the litigation. Such objection affords no ground for a demurrer. The defect can be reached by exceptions.<sup>32</sup> Exceptions for scandal and impertinence will not be heard, "unless," in the language of equity rule 27, "the exception shall be filed on or before the next rule day after the process on the bill shall be returnable." It thus appears that the time for bringing in these exceptions is hardly more extended than the time allowed for the putting in of the defendant's appearance.

A court of equity may take notice of the defect of scandal or impertinence of its own accord, and order the plaintiff to plead again to better effect, otherwise the whole bill to be stricken.<sup>33</sup>

**§ 295. Form of Exceptions.**

Exceptions for impertinence must be specific. An exception stating that certain specified allegations are impertinent and have no bearing on any of the issues involved or that may be involved in the suit is sufficiently specific to raise the question of the pertinence or impertinence of those allegations.<sup>34</sup>

In excepting for impertinence, the pleader should not restate the whole substance of the bill and answer and then except generally for impertinence, leaving to the court the task of ascertaining just where the defective matter is. It should be pointed out in a clear and definite way.<sup>35</sup>

**§ 296. Exception Must Be Good as to Whole.**

An exception for impertinence impliedly admits that there is a proper residue as to which the matter sought to be expunged is surplusage. As an entire bill cannot be attacked for surplusage, an exception for impertinence will not lie to the whole. Furthermore, an exception for impertinence must be allowed as a whole or not at all.<sup>36</sup>

<sup>32</sup> *Stonemetz Printers Co. v. Brown* etc. Co. (1891) 46 Fed. 72; *Howe v. Fed.* 907.  
*Haugan* (1904) 140 Fed. 183.

<sup>33</sup> *Kelley v. Boettcher* (1898) 29 C. Fed. 836.  
C. A. 14, 85 Fed. 55.

<sup>34</sup> *United States v. Hyde* (1906) 145 Fed. 393.

<sup>35</sup> *Blanton v. Chalmers* (1906) 158

<sup>36</sup> *Stokes v. Farnsworth* (1900) 99

A paragraph in the bill is therefore not subject as a whole to an exception, if it contains some good allegations, as where some of the facts stated are essential to confer jurisdiction.<sup>37</sup>

**§ 297. Disposing of Exceptions—Reference to Master.**

The practice in regard to disposing of exceptions for scandal and impertinence is so clearly defined in the equity rules that it would seem to be needless to go over the matter in detail.<sup>38</sup> But one observation may be profitably made. Rules 26 and 27 clearly contemplate that exceptions to a bill for scandal and impertinence shall be referred to the master. On this point the rules have simply adopted the procedure of the English court of chancery.<sup>39</sup>

The practice of referring these exceptions to a master is convenient enough in courts where there is a standing master; but it is not to be supposed that in those federal courts that have no standing master, it is necessary in every case to appoint a special master solely for the purposes of such a reference. Evidently the court can look into the exceptions itself, and no doubt it will do so where the exceptions are not too numerous and troublesome. Under equity rule 63, exceptions to an answer for insufficiency are heard by the court without a reference, and there is no reason why exceptions to a bill for scandal and impertinence should not be thus heard if the court is so disposed. The practice of referring the exceptions to a master, as contemplated in rule 27, is plainly discretionary.

On a reference to a master to expunge scandalous and impertinent matter, he has no authority to strike redundant and prolix statements. Such defect can only be reached by dismissing the bill and requiring the plaintiff to plead more concisely. The objection that the entire pleading is rambling and verbose affords no ground for an exception for impertinence.<sup>40</sup>

*External Formalities Pertaining to Bill.*

**§ 298. Paragraphic Division of Bill.**

The body of the bill should be divided into paragraphs consecutively numbered, each paragraph containing a separate fact and its special circumstances. Such a division not only generally makes a

<sup>37</sup> *Board of Trade v. Nat. Board* (1907) 164 Fed. 238.

<sup>38</sup> Equity rules 26, 27.

<sup>39</sup> See Nos. 11 and 12, English Orders in Chan. (1828, 1831).

<sup>40</sup> *Kelley v. Boettcher* (1898) 29 C. C. A. 14, 85 Fed. 55.

bill more logical, but greatly facilitates reference to its parts, and better enables the defendant to frame his answer.<sup>41</sup>

#### § 299. Signature of Counsel.

Every bill must contain the signature of counsel "annexed to it." This is considered as an affirmation on his part that, on the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.<sup>42</sup>

An amended bill, as well as the original, should also always contain the signature of counsel, except where the amendments are made informally by interlineation.<sup>43</sup> If application is made for leave to file an amended bill, and the court, after examining the affidavits on which the application is based and also the amended bill which is proposed to be filed, grants the order for leave to file the amended bill, it could hardly be considered that the signature of counsel would be necessary. But no doubt out of abundant precaution the signature should be annexed to the amended bill even in such case.

The practice of requiring counsel to sign the bill appears to have originated under Sir Thomas More, who made an order to that effect. The earlier practice was for the bill to be examined by one of the masters in chancery in order that he might determine whether the matter contained in the bill was proper to be brought before the court in that way.<sup>44</sup> As counsel are officers of the court of chancery it was reasonable that their certificate should be accepted in lieu of that of a master.

By signing the bill counsel becomes responsible, in a measure, for the statements contained in it; and if the allegations of a bill are impertinent and scandalous, such matter may be expunged and counsel may be ordered to pay the costs. The same applies where the pleading is of immoderate length.<sup>45</sup>

#### § 300. How Signature Must Be Affixed.

The requirement that the bill shall be signed by counsel is obligatory, and no bill is complete without such signature. It was at one

<sup>41</sup> Gibson, *Suits in Chan.* (2d ed.) § 157.

<sup>42</sup> Equity rule 24.

<sup>43</sup> Under the English practice counsel signed only the original draft and his signature was supplied to the amended bill by the engrossing clerk as a matter of course. 1 Dan. Ch. Pr. 410. This practice is not adapted to use in the federal courts.

<sup>44</sup> 1 Dan. Ch. Pr. 409.

<sup>45</sup> "If any bill, answer, replication, or rejoinder shall be found of an immoderate length, both the party and the counsel under whose hand it passed shall be fined." No. 55, Lord Bacon's Ordinances.

time held that the indorsement of counsel's name on the back of the bill was a sufficient signing;<sup>46</sup> but under equity rule 24 it is required that the signature shall be "annexed to" the bill. This probably means that the signature of counsel shall be subscribed. But no doubt a formal or informal certificate bearing the signature of counsel and accompanying the bill would be enough.

It is sufficient if the plaintiff's attorney or counsel signs the bill as "solicitor for complainant," since the distinction between the classes of legal practitioners is not much observed by the American courts.<sup>47</sup>

### § 301. Objection for Absence of Signature.

A bill lacking the proper signature of counsel is in bad form and has been held to be subject to demurrer on that ground.<sup>48</sup> The more usual and proper practice, however, is for the defendant to move the court to take the bill off the file<sup>49</sup> as being contrary to the forms of equity. If the objection is found to be well taken the bill will be ordered to be taken off the file and suppressed.<sup>50</sup>

*Rosch v. Hulings* (1840) 5 Cranch, C. C. 637, Fed. Cas. No. 11,874: The bill was for an injunction to stay execution on an action at law. The bill, though sworn to by the plaintiff, was inadvertently submitted without being signed by counsel. Cranch, J., granted the injunction in vacation without noticing the defect. Afterwards on motion it was ordered that the bill be taken from the file. This was done, and plaintiff's counsel, having then affixed his signature, presented the bill again and obtained an injunction *de novo*.

Under the liberality of practice prevailing to-day in regard to all matters of pure form, a court before whom this objection to a bill is made will permit it to be amended on the spot without delay. It is matter of form amendable at any time.<sup>51</sup>

### § 302. Plaintiff's Signature.

The plaintiff is not usually required to sign the bill himself, the signature of counsel being deemed sufficient;<sup>52</sup> but if a suit is brought

<sup>46</sup> *Dwight v. Humphreys* (1842) 3 McLean, 104, Fed. Cas. No. 4,216.

<sup>47</sup> *Stinson v. Hildrup* (1878) 8 Biss. 376, Fed. Cas. No. 13,459.

<sup>48</sup> *Kirkley v. Burton* (1820) 5 Madd. Ch. 378.

<sup>49</sup> *French v. Dear* (1800) 5 Ves. Jr. 547.

<sup>50</sup> 1 Dan. Ch. Pr. 409.

The court may, of its own accord, on observing that the bill is lacking in the signature of counsel, order the same to

be taken off the file. 1 Dan. Ch. Pr. 409.

<sup>51</sup> Equity rule 28.

<sup>52</sup> *Briggs v. Neal* (C. C. A.; 1903) 56 C. C. A. 572, 120 Fed. 227.



by the plaintiff in person his own signature is of course subscribed and no signature of counsel is then necessary.<sup>53</sup>

### § 303. Verification of Bill.

So far as the mere matter of pleading is concerned, a bill in equity does not require to be verified by the oath or affidavit of any person. The signature of counsel supplies all the authentication necessary to the bill, considered as the statement of the plaintiff's cause of action. But it often happens that other uses are made of the bill besides that of a mere pleading. For instance, the plaintiff may seek some extraordinary relief pending the suit, such as the granting of a preliminary injunction or the appointment of a receiver. In such cases the bill is read at the hearing of the preliminary motion for such relief with the same force and effect as an affidavit. Accordingly, when it is intended to make such use of the bill, it should be sworn to, otherwise verification by oath is not required.<sup>54</sup> But a bill is not demurrable for lack of sworn verification, though it prays for an injunction; for perchance the application for the injunction may not be actually made.<sup>55</sup>

### § 304. Manner of Verification.

Where the bill is required to be verified by oath the verification should normally be made by the plaintiff himself, and the verification should be by an affidavit subscribed and sworn to in the usual form. But by a practice that has grown up in the equity courts of the United States and which is sanctioned by long usage in some of the districts, it is permitted that the bill should be verified by the plaintiff, his agent, or solicitor, making oath to the truth of the bill; the officer administering the oath merely adding his jurat, or certificate of the fact. This jurat should state clearly all things necessary to impart validity to the verification.<sup>56</sup>

<sup>53</sup> *Martin v. Palmer* (1900) 72 Vt. 409.

<sup>54</sup> *Hughes v. Northern P. R. Co.* (1883) 18 Fed. 110.

<sup>55</sup> *National Hay Rake Co. v. Harbert* (1875) 2 W. N. C. 100, Fed. Cas. No. 10,044; *Woodworth v. Edwards* (1847) 3 Woodb. & M. 120, Fed. Cas. No. 18,014.

<sup>56</sup> *Blake Crusher Co. v. Ward* (1874) 1 Am. L. T. R. N. S. 423, Fed. Cas. No. 1,506. In this case it was said: "It should appear that the person making

oath is the same person who signed the bill; and when the bill is signed by an agent or officer of a corporation complainant, or by an agent or the solicitor of the complainant, it should appear that the person made oath that he was such agent, officer or solicitor; and when by the agent or solicitor of complainant (except perhaps in the case of a corporation complainant), it should appear that such agent or solicitor made oath to the reason for his making the oath instead of the complainant."

A bill requiring verification may be verified by a party who has, by assignment, parted with all interest in the subject-matter.<sup>57</sup>

**§ 305. Substance of Matters Verified.**

The following sorts of bills must be verified by oath or accompanied by an affidavit showing the particular facts indicated: Thus, in connection with the bill to take testimony *de bene esse*, it must be made to appear that there are special circumstances, such as age or infirmity of the witnesses or an intention of leaving the country, which make it probable that their testimony may be lost if it is not taken. In connection with the bill of interpleader it must appear by sworn bill or affidavit that there is no collusion between the plaintiff and any of the parties. In a suit to recover upon a lost instrument, it must be made to appear by the sworn bill or affidavit that the instrument is lost. In suits for the discovery of deeds and writings, and for relief founded on such instruments, the plaintiff must annex an affidavit to his bill or show in his bill that those instruments are not in his custody or power and that he knows not where they are unless they are in the hands of the defendant. In the two situations last mentioned, the fact required to be verified is essential to support the jurisdiction of the court, for if the instrument be not lost, or if the deed in question be in the plaintiff's custody or power, the remedy is at law. In all these cases, if the requisite facts be not shown in the sworn bill or in an affidavit accompanying the unverified bill, the bill is demurrable.<sup>58</sup>

The ordinary bill for discovery does not have to be verified.<sup>59</sup> But a bill to obtain discovery and relief in respect of land, the title to which has already been conveyed to plaintiff by a deed that has been lost, should be accompanied by an affidavit showing the loss of such instrument, and the absence of such affidavit is good cause for demurrer. But the defect is so far cured by a failure to demur and by answering or allowing a judgment *pro confesso* to be taken, that the appellate court will not take notice of it and reverse.<sup>60</sup>

**§ 306. Motion to Dismiss for Lack of Formality.**

A motion to dismiss will lie for lack of any formal step that is a condition precedent to the right to institute the suit or to issue

<sup>57</sup> *Briggs v. Neal* (C. C. A.; 1903) 56 C. C. A. 372, 120 Fed. 227.  
<sup>58</sup> 1 Dan. Ch. Pr. 504, 507.

<sup>59</sup> 1 Dan. Ch. Pr. 504.  
<sup>60</sup> *Findlay v. Hilde* (1828) 1 Pet. 241, 7 L. ed. 123.

process, or for any irregularity or informality in the bill or in the mode of instituting the suit.

The motion to strike the bill from the files, which is substantially the same thing as the motion to dismiss, also furnishes a ready means for getting rid of a suit irregularly begun or begun without authority. Thus, if a bill lacks any of the required formalities, such as the signature of counsel or a verification, where this is necessary, a motion to strike will lie. The same procedure is appropriate where the bill fails, in the introductory part, to give the names, places of abode, and citizenship of the parties, as required by equity rule 20; or where the prayer for process fails to give the names of all the defendants mentioned in the introductory part of the bill. Defects of the kind above mentioned are of a rather venial character, and the making of a motion to dismiss for such irregularities is hardly more than a challenge that will result in the plaintiff's amending his bill, a thing the court will always permit.

A motion to strike a bill from the files has been held to be a proper proceeding where the plaintiff is alleged by the defendant to be incompetent to sue, for lack of mental capacity.<sup>61</sup>

<sup>61</sup> *Dudgeon v. Watson* (1885) 23 Fed. 161.

## CHAPTER VII.

### JURISDICTIONAL AVERMENT.

#### *General Observations and General Principles.*

- 307. Averment of Federal Jurisdiction.
- 308. Want of Equity Not Jurisdictional.
- 309. Federal Jurisdiction Must Affirmatively Appear.
- 310. Jurisdictional Allegation Must Be Positive and Distinct.
- 311. Where Jurisdictional Fact Should Appear.
- 312. Jurisdiction in Ancillary Suit.
- 313. Effect of Failure to Show Jurisdictional Fact.
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*General Observations and General Principles.*

**§ 307. Averment of Federal Jurisdiction.**

In our treatment of the several formal parts of the bill it appeared that what is known as the general jurisdiction clause, wherein it is averred that the cause is one of equitable cognizance and that the plaintiff has no adequate remedy in any other court than that of equity, is obsolete or at least dispensable.<sup>1</sup> Very different from this question of the general jurisdiction of the court, as a court of equity, is that which arises in every case in regard to the special and limited jurisdiction of the federal court. In this chapter we are to consider the allegations necessary to be made in order to establish the plaintiff's right to prosecute his suit in the federal court, and the mode in which the sufficiency of those allegations may be tested. We note that this question of the special and limited jurisdiction of the court is one that pertains equally to suits in either side of the court, and decisions in actions at law are cited as authority in suits in equity and *vice versa*. This will explain why some of the authorities referred to in the treatment of this subject are cases at law. The general principles applicable in both legal and equitable proceedings are practically the same, and if reasonable allowances are made for certain diversities of practice at law and in equity, the practitioner will not be misled.

The term jurisdiction, as it is used in connection with the federal courts and more particularly as it is used in the judiciary acts defining the limits of the jurisdiction of the federal courts, refers to the statutory power of the court to hear and determine a cause. An absence or want of jurisdiction is a want of power. The question of jurisdiction in this sense is to be distinguished from that question of

<sup>1</sup> See ante, § 232.

the disability of the court which arises on other grounds than the lack of inherent power. If a plaintiff fails to comply with some condition that the court has prescribed as a prerequisite to the maintaining of a particular suit, the court will not entertain the suit, though it may have ample power provided the suit were properly brought.<sup>2</sup>

**§ 308. Want of Equity Not Jurisdictional.**

The question of a want of equity on the face of the bill, or on the case as made out on the record, is a question of merit and not a question of jurisdiction. Hence a demurrer based on the contention that the plaintiff's remedy is at law and not in equity does not raise a question of jurisdiction, as this term is used in the statutes relating to the power of the federal courts to entertain and determine causes of first instance and appeals. This point has only been brought out clearly in late decisions regarding the appellate jurisdiction of the supreme court under the act creating the circuit courts of appeals.<sup>3</sup>

*Smith v. McKoy* (1896) 161 U. S. 355, 40 L. ed. 731: The defendant in a bill in equity moved to dismiss on the ground that the plaintiff had a plain, adequate, and complete remedy at law. The court overruled the motion and proceeded to judgment. An appeal was taken directly to the supreme court on the idea that a question of jurisdiction was involved; but the supreme court refused to entertain the appeal, holding that the objection raised by the defendant below, to wit, that the plaintiff's remedy was at law, was not an objection to the jurisdiction, in the sense of a power to entertain the suit, but merely an objection grounded on a want of equity in the bill, considered as a question of merit. It was observed by the court that a contrary ruling would require the supreme court to entertain an appeal direct from the circuit court in every case where the defendant chose to demur on the ground that plaintiff's remedy was at law. Whether a court has power to maintain a suit at all, is a question of jurisdiction, but whether the plaintiff in litigating that suit should be required to proceed in equity or at law, is a question of merit and depends on the facts disclosed in each case.

**§ 309. Federal Jurisdiction Must Affirmatively Appear.**

In regard to matters affecting the jurisdiction of the federal courts, it is a general rule that he who affirms jurisdiction over a particular

<sup>2</sup> *Failure to Comply with Condition.*— abundant power to do so. This is not Thus, if a plaintiff stockholder, suing in a question of jurisdiction. Illinois Cent. R. Co. v. Adams (1900) 180 U. S. 28, 34, the right of the corporation, fails to comply with the conditions named in equity rule 94, the court will not entertain the suit, though it may have

<sup>3</sup> *Building and Loan Ass'n v. Price* (1898) 169 U. S. 45, 42 L. ed. 666;

controversy to be in a federal court must clearly make that fact to appear. The district and circuit courts are not, strictly speaking, inferior courts,<sup>4</sup> for their judgments import verity, but they are nevertheless courts of strictly limited jurisdiction; and in all cases where their powers are called into play the fact that such courts have jurisdiction must always appear in the record.<sup>5</sup> The same is also true of any special tribunal created under federal authority.<sup>6</sup>

*Monsfield etc. R. Co. v. Swan* (1884) 111 U. S. 379, 382, 28 L. ed. 462, 463: Mr. Justice Matthews said: "The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."<sup>7</sup>

All matters pertaining to the sufficiency of the record and of the pleadings on the question of the jurisdictional fact are of course to be

*World's Columbian Exposition Case* (1893) 6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. 654; *Blythe Co. v. Blythe* (1898) 172 U. S. 644, 43 L. ed. 1183; *Blythe v. Hinckley* (1899) 173 U. S. 501, 43 L. ed. 783.

<sup>4</sup> *Kempe v. Kennedy* (1809) 5 Cranch, 185, 3 L. ed. 73.

<sup>5</sup> *Ex p. Smith* (1876) 94 U. S. 455, 24 L. ed. 165; *Continental Ins. Co. v. Rhoads* (1886) 119 U. S. 239, 30 L. ed. 380; *Little York etc. Co. v. Keyes* (1877) 96 U. S. 201, 24 L. ed. 658; *Scott v. Sanford* (1856) 19 How. 473, 15 L. ed. 728; *Confiscation Cases* (1873) 20 Wall. 107, 22 L. ed. 323; *Norton v. Brewster* (1884) 23 Fed. 840; *Anderson v. Jackson* (1828) Fed. Cas. No. 357.

"A circuit court, though an inferior court, in the language of the constitution, is not so in the language of the common law; nor are its proceedings subject to the scrutiny of those narrow rules, which the caution, or jealousy, of the courts at Westminster, long applied to courts of that denomination; but are entitled to as liberal intendments, or presumptions, in favor of their regularity, as those of any supreme court. A

circuit court, however, is of limited jurisdiction; and has cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace.

And the fair presumption is (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears." *Ellsworth, C. J., Turner v. Bank of North America* (1799) 4 Dall. 11, 1 L. ed. 719. Compare language of *Strong, J.*, in *Miller v. U. S.* (1871) 11 Wall. 299, 20 L. ed. 142.

<sup>6</sup> *U. S. v. Santa Fe* (1897) 165 U. S. 714, 41 L. ed. 888.

<sup>7</sup> *Metcalf v. Watertown* (1888) 128 U. S. 586, 32 L. ed. 549; *Powers v. Cheapeake, etc. R. Co.* (1898) 169 U. S. 92, 42 L. ed. 673; *Continental Nat. Bank v. Buford* (1903) 191 U. S. 119, 48 L. ed. 119; *Defiance Water Co. v. Defiance* (1903) 191 U. S. 184, 48 L. ed. 140; *Perez v. Fernandez* (1906) 202 U. S. 80, 50 L. ed. 849. Compare *King Bridge Co. v. Otose County* (1887) 120 U. S. 225, 30 L. ed. 623; *Mattingly v. Northwestern etc.*

determined by the federal courts themselves. On these, as on the general question of the limits of the jurisdiction of the federal courts, the supreme court is the final arbiter.<sup>8</sup>

### § 310. Jurisdictional Allegation Must Be Positive and Distinct.

The jurisdictional fact cannot be established argumentatively or by mere inference. It must appear from distinct allegations or from facts clearly proven.<sup>9</sup> The presumption in every stage of a cause is that the court is without jurisdiction unless the contrary affirmatively appears from the record.<sup>10</sup> The supreme court in passing on the question of jurisdiction acts on the general principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if the parties desire it.

Neither consent, agreement, nor estoppel can operate to confer jurisdiction on a federal court to hear and determine a cause if the essential jurisdictional fact does not appear of record.<sup>11</sup>

### § 311. Where Jurisdictional Fact Should Appear.

While, as just stated, the jurisdictional fact must always appear of record, it is not always essential that such fact should appear in the pleadings. It is sometimes sufficient if the fact elsewhere affirmatively appears from the record. In fact, there are two well-defined classes of cases, in one of which the jurisdictional fact must appear in the pleadings and, more particularly, in the plaintiff's statement of his claim; in the other, the jurisdictional fact may be shown anywhere in the record proper. In the first class of actions jurisdiction depends on the nature of the cause of action; in the second it depends on the character of the parties. The nature of this distinction will appear more clearly in the discussion that is to follow.

### § 312. Jurisdiction in Ancillary Suit.

The rules as to jurisdictional averments stated in this and the succeeding chapter are the rules that maintain as regards original bills; and they are not applicable in suits of an ancillary, auxiliary,

T. Co. (1895) 158 U. S. 63, 39 L. ed. 894; S. 340, 38 L. ed. 468; *Equitable L. Assur. St. Louis etc. R. Co. v. Newcomb* (1893) 56 Fed. 951, 6 C. C. A. 172; Soc. v. Brown (1902) 187 U. S. 311, 47 L. ed. 192.

<sup>9</sup> *Starr v. Chicago etc. R. Co.* (1901) 110 Fed. 3, 5.

<sup>10</sup> *Thomas v. Trustees* (1904) 196 U. S. 218, 49 L. ed. 187.

<sup>11</sup> *Dowell v. Applegate* (1894) 152 U. Eq. Prac. Vol. I.—12.

<sup>11</sup> *Railway Co. v. Swan* (1884) 111 U. S. 379, 28 L. ed. 462; *Olds Wagon Works v. Benedict* (1895) 67 Fed. 5, 14 C. C. A. 235.



or dependent character. In ancillary suits the jurisdiction of the court is sustained by the jurisdiction in the principal case, and it is not necessary that the bill in such suit should contain jurisdictional averments such as would be required if the suit were an original proceeding. The subject of ancillary suits is fully considered elsewhere in this treatise.<sup>12</sup>

### § 313. Effect of Failure to Show Jurisdictional Fact.

Where the record, in an original proceeding, fails to show the facts on which the jurisdiction of the federal court rests, any judgment rendered thereon is erroneous and will be reversed. But such a judgment is not a nullity, and until vacated or reversed by proper proceedings it is binding.<sup>13</sup>

### § 314. Proof of Jurisdictional Fact.

The jurisdictional averment in the bill, if not admitted in the pleadings of the defendant, must be supported by affirmative proof.<sup>14</sup> Formerly, in the practice of the federal courts, jurisdiction of a case, commenced originally in a circuit court of the United States, attached if the bill contained sufficient averments of the jurisdictional fact, and to oust the court of jurisdiction the defendant was required to contest the jurisdiction by a special plea; but under the statutes now governing the practice, the federal courts are required on their own motion to disclaim jurisdiction at any stage of a case, if satisfied that any essential fact does not exist. Therefore, whenever the record shows upon its face that there is a controversy as to a jurisdictional fact, the court must require proof to support a finding to eliminate such question, or else assume that it does not have jurisdiction.<sup>15</sup>

### § 315. Jurisdiction Dependent on Facts at Institution of Suit.

Jurisdiction depends on the state of things at the beginning of the action, and subsequent events cannot oust it.<sup>16</sup> The jurisdiction of a

<sup>12</sup> See *post*, chapter XXIX., §§ 1228, 1229.

<sup>13</sup> *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* (1887) 123 U. S. 657, 31 L. ed. 204; *Kempe v. Kennedy* (1809) 5 Cranch, 185, 3 L. ed. 73; *In re Eaton* (1892) 51 Fed. 804.

<sup>14</sup> *Oregon etc. Co. v. Shell* (1904) 143 Fed. 1006 (1903) 125 Fed. 979. *Klenk v. Byrne* (1906) 143 Fed. 1009.

<sup>15</sup> *Klenk v. Byrne* (1906) 143 Fed. 1008, 1009; *Roberts v. Lewis* (1892) 144 U. S. 653, 12 Sup. Ct. 781, 36 L. ed. 579; *Anderson v. Watts* (1891) 138 U. S. 694, 11 Sup. Ct. 449, 34 L. ed. 1078; *Steigleder v. McQuesten* (1905) 198 U. S. 141, 25 Sup. Ct. 616, 49 L. ed. 986; *O. R. & N. Co. v. Shell* (C. C. A.; 1903) 125 Fed. 979.

<sup>16</sup> *Hardenbergh v. Ray* (1894) 151 U.

court of the United States once obtained over property by the bringing of the same within its custody continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the state or by any proceedings subsequently commenced in a state court.<sup>17</sup>

If the claim to relief clearly within the federal jurisdiction is fairly made and is not fictitious or fraudulent, jurisdiction attaches although the ultimate decision may be against the right claimed.<sup>18</sup>

*Jurisdictional Averment of Existence of Federal Question.*

**§ 316. Allegation of Federal Question.**

Subject to a limitation as to the amount or value in dispute, the circuit court has original jurisdiction of causes arising under the constitution, laws, or treaties of the United States. Furthermore, in the same class of cases it may acquire jurisdiction by removal from a state court. The term "federal question," it may here be noted, is commonly used to indicate the ground of jurisdiction in these cases.<sup>19</sup> Where the suit is originally brought in a federal court, it is the plaintiff who thereby exercises his choice in regard to the forum. Where the suit is originally brought in the state court and thence removed to the federal court by the defendant, it is the defendant who thereby makes effective his preference for the federal forum. We shall proceed briefly to consider the question of the form and mode in which the jurisdictional fact should be made to appear of record in the situation just referred to. And first of cases in which the original jurisdiction of the federal court is invoked by the institution of the suit in this court.

**§ 317. Should Be Stated in Plaintiff's Pleading.**

In the first place it will be observed that this jurisdictional fact, to wit, that the suit involves a controversy arising under the constitution, laws, or treaties of the United States, is one which in its very

S. 112, 14 Sup. Ct. 305, 38 L. ed. 93; (1898) 168 U. S. 695, 42 L. ed. 630; Salt Co. v. Brigel (1898) 30 C. C. A. 415, Louisville Trust Co. v. Stone (1901) 107 86 Fed. 818; Dunn v. Clarke (1834) 8 Fed. 309, 46 C. C. A. 299.

Pet. 1, 8 L. ed. 845; Mollan v. Torrance (1824) 9 Wheat. 537, 6 L. ed. 154; *Ex p.* Kyle (D. C.; 1895) 67 Fed. 306; Ritchie v. Burke (1901) 109 Fed. 16, 19.

<sup>17</sup> Rio Grande R. Co. v. Gomila (1869) 132 U. S. 478, 481, 33 L. ed. 400, 401.

<sup>18</sup> Penn Mut. Life Ins. Co. v. Austin chapter,

<sup>19</sup> The term federal question is also used to indicate the jurisdictional ground in those cases where a writ of error lies to the supreme court of the United States from the state courts of last resort. This class of cases does not come within the scope of the present

nature should be stated in the plaintiff's bill, declaration, or petition. In a suit in equity the jurisdictional fact should be inserted in the stating part of the bill. In order to give the circuit court jurisdiction of a case as one arising under the constitution, laws, or treaties of the United States, that it does so arise must appear from the plaintiff's own statement of his claim.<sup>20</sup> "It must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground."<sup>21</sup>

*Metcalf v. Watertown* (1888) 128 U. S. 586, 589, 32 L. ed. 543, 544: The principle was here fully stated by Mr. Justice Harlan in the following words: "Where, however, the original jurisdiction of a circuit court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a federal nature, it must appear at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the circuit court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer, or motion, or upon its own inspection of the pleading, must dismiss the suit; just as it would remand to the state court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the circuit court. It cannot retain it in order to see whether the defendant may not raise some question of a federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind."

### § 318. Particular Facts Must Be Stated—General Averment Insufficient.

Furthermore, it is necessary that the particular facts showing that the suit does so arise should be stated. A general averment that the

<sup>20</sup> *Colorado v. Turek* (1893) 160 U. S. 138, 37 L. ed. 1030; *Tennessee v. Union Co. v. Miller* (1899) 96 Fed. 1; *City Ry. etc. Bank* (1894) 152 U. S. 454, 38 L. ed. 17; *Co. v. Citizens' St. R. Co.* (1897) 17 Sup. Ct. 653, 166 U. S. 557, 41 L. ed. 511; *Oregon v. Skottowe* (1896) 162 U. S. 1114, *modifying* *decree Citizens' St. R. Co. v. City Ry. Co. (C. C.)* 1894) 64 Fed. Davies (1896) 163 U. S. 273, 41 L. ed. 647; *Illinois Cent. R. Co. v. Chicago, B. & N. R. Co.* (1886) 26 Fed. 477. <sup>21</sup> *Western Union Telegraph Co. v. Maurice* (1902) 185 U. S. 110, 46 L. ed. 828; *Vicksburg Waterworks Co. v. Vicksburg* (1902) 185 U. S. 68, 46 L. ed. 809; *Henry v. La Compagnie Generale Transatlantique etc.* (1899) 96 Fed. 497; *California Oil & Gas Co. of Arizona* Gold Min. Co. (1900) 175 U. S. 571, v. Miller (1899) 96 Fed. 12; *Dewey Min.* 44 L. ed. 278, 20 Sup. Ct. 222.

case arises under the constitution, laws, or treaties of the United States is not enough, since that would merely involve the statement of a legal conclusion.<sup>22</sup>

1. *Holland v. Ryan* (1883) 17 Fed. 1: In a suit to recover mining claims it was alleged that the action involved the "construction and consideration of the laws of the United States upon the subjects of mines and mining and the validity and title to mining claims occurring and arising thereunder." The allegation was held insufficient.

2. *Bionville Water-Supply Co. v. City of Mobile* (1899) 20 Sup. Ct. 40, 175 U. S. 109, 44 L. ed. 92: In this case the federal question alleged to be involved was the impairment of a contract. It was held not to be sufficient to allege generally that the defendant was violating the contract in question. Facts should have been pleaded which would speak for themselves and clearly show the violation of the obligation of the contract.

### § 319. Facts to Be Clearly Shown.

The bill must also clearly show the existence of any fact that is a condition precedent to the existence of the alleged right under the constitution or laws. Thus, a bill cannot be maintained under the impairment of contract clause of the constitution unless the contract is shown to exist.

*Underground Railroad v. City of New York* (1904) 193 U. S. 416, 46 L. ed. 733 (1902) 116 Fed. 952: Suit was brought to enjoin municipal authorities from doing certain acts which, it was alleged, would impair the obligation of certain corporate grants, franchises, and privileges alleged to be vested in them. These it was insisted were within the protection of that clause of the constitution which forbids the impairment of the obligation of contracts. The court was of the opinion that on the facts stated the contract rights claimed did not exist, and accordingly the bill was dismissed.<sup>23</sup>

The question whether a party does really and effectively claim a right under the constitution, laws, or treaties of the United States is to be determined by the proper legal construction of the allegations of the bill, without any particular regard to the interpretation put on those allegations by the opposing party.<sup>24</sup>

<sup>22</sup> *Manhattan Ry. Co. v. City of New York* (1889) 19 Fed. 196; *City of Fergus Falls v. Fergus Falls Water Co. & Water Co. v. City of Los Angeles* (1896) 72 Fed. 873, 19 C. C. A. 212; (1896) 76 Fed. 148. Compare *Booth v. Lloyd*, (1887) 33 Fed. 503.

Where the facts stated are sufficient to raise a question of a right under the constitution of the United States, it is not also essential that the particular clause of the constitution under which

the right is claimed should be specifically referred to. *Crystal Springs Land*

<sup>23</sup> Compare *New Orleans v. New Orleans etc. Co.* (1891) 142 U. S. 86, 35 L. ed. 946.

<sup>24</sup> *New Jersey etc. R. Co. v. Mills* (1885) 113 U. S. 249, 267, 28 L. ed. 946, 951.

**§ 320. Plaintiff Cannot Rely on Possible Defense as Ground of Jurisdiction.**

The principle that the plaintiff's own statement of his cause must contain facts sufficient to sustain jurisdiction under the head now being considered is subject to the following condition, namely, the right in question claimed under the constitution, laws, or treaty must appear to be necessary to the plaintiff's own case. The plaintiff in stating his cause of action has no concern with any defense that the defendant may or may not put in. Hence it follows that if, in the proper statement of the plaintiff's case, no cause of action under the constitution or laws of the United States is revealed, the plaintiff cannot make out a case within the federal jurisdiction by anticipating the defense and asserting that the defendant claims under the constitution, laws, or treaties of the United States. What the defendant may or may not claim is a matter of pure speculation until the answer or plea is filed. Hence, this matter cannot be used to determine the jurisdiction of the court in the first instance. The cases in which this principle has been applied are numerous enough.

1. *Tennessee v. Union and Planters' Bank* (1894) 152 U. S. 454, 38 L. ed. 511: A bill in equity was filed to recover taxes alleged to be due to the state and county by the defendant bank. The state asserted its rights to recover the taxes under one of its own laws. This raised no federal question. But it was further asserted that the defendant would contend that the law in question was void because in contravention of the constitution of the United States. But the court said: "By the settled law of this court, a suggestion of one party that the other will or may set up a claim under the constitution or laws of the United States does not make the suit one arising under that constitution or those laws." 25

2. *Florida Cent. etc. R. Co. v. Bell* (1900) 176 U. S. 321, 44 L. ed. 496: The plaintiff asserted title to land derived under and by virtue of a patent granted by the United States,—a fact not of itself sufficient to confer jurisdiction. It was further alleged that the defendant claimed under a particular statute of the United States. It was held that this allegation did not help the case on the question of jurisdiction.

The rule may be otherwise stated as follows: The possibility or even probability that a federal question may arise during the

<sup>25</sup> *Chappell v. Waterworth* (1894) 155 U. S. 102, 39 L. ed. 85; *East Lake Land Co. v. Brown* (1894) 155 U. S. 488, 39 L. ed. 233; *Postal Tel. Cable Co. v. Alabama* (1894) 155 U. S. 487, 39 L. ed. 232; *Oregon Short Line Co. v. Skottowe* (1896) 162 U. S. 490, 40 L. ed. 1048; *Sawyer v. Kochersperger* (1897) 170 U. S. 303, 42 L. ed. 1048; *Galveston, etc. Ry. v. Texas* (1898) 170 U. S. 236, 42 L. ed. 1020; *New Orleans v. Warner* (1898) 171 U. S. 686, 43 L. ed. 1179; *Third Street, etc. Ry. v. Lewis* (1899) 173 U. S. 460, 43 L. ed. 767; *Boston*

progress of a cause will not support original jurisdiction in the federal court, but the plaintiff's statement of his own claim must show that such a question is necessarily involved and must be determined. Hence, it is said that all allegations of a bill as to the defenses that may be asserted by the defendant are to be disregarded on the question of jurisdiction.<sup>26</sup>

Where the bill in the stating part sets forth a cause of action within the jurisdiction of the federal court, the court will have jurisdiction although in the charging part of the bill the plaintiff anticipates and replies to a possible defense which, if interposed, would raise a question not justiciable in the federal court.

*Atherton etc. Co. v. Atwood-Morrison Co.* (1900; C. C. A.) 102 Fed. 949, 356, 43 C. C. A. 72: The plaintiff filed a bill against an alleged infringer of a patent seeking an injunction and an accounting. The case stated was clearly one of federal cognizance, inasmuch as the controversy arose under the patent laws. But in his bill the plaintiff alleged that the defendant relied on a pretended assignment; and, by anticipation, plaintiff's defense to this pretended assignment was stated. If the controversy had turned wholly on this assignment then the cause of action might have been considered as being non-federal, since it would have arisen under the contract and not under the patent laws. But it was held that the federal court had jurisdiction nevertheless. "If the bill sets forth a case within the jurisdiction of the court, the jurisdiction cannot be ousted by the anticipation and denial of possible defenses that may or may not be made."

### § 321. Federal Question in Removal Causes.

The circuit court, as at present constituted, has jurisdiction by removal to entertain suits based on controversies arising under the constitution, laws, or treaties of the United States, and a few words are here necessary as to the form in which the federal question should be made to appear of record in removal cases. It should be observed that before the passage of the Judiciary Act of March 3, 1875, c. 137, the circuit court had no jurisdiction, either original or by removal, of

*etc. Co. v. Montana Ore. Co.* (1903) 168 U. S. 632, 47 L. ed. 826; *Sawyer v. Parish of Concordia* (1882) 12 Fed. 754; *Levy v. City of Shreveport* (1886) 28 Fed. 209.

<sup>26</sup> *Wise v. Nixon* (C. C.; 1897) 78 Fed. 203; *California Oil etc. Co. v. Miller* (1899) 96 Fed. 12, 19.

In all these cases where the plaintiff is unable, on the facts and merits of his own claim, to state a case within the federal jurisdiction, his only recourse is to

go into a state tribunal. If the defendant there puts in a defense involving the construction of the constitution, laws, or any treaty of the United States, the plaintiff must litigate the question with him to a finish in the state court; and if the decision on the point involving the federal question is decided against him in the state court of last resort, he can take the case by writ of error to the supreme court of the United States and there have the decision reviewed.

cases involving what is called a federal question. But by section one of that act the court was given original jurisdiction of suits of a civil nature at common law or in equity arising under the constitution or laws of the United States, or treaties made under their authority. By the second section of the same act, the circuit court was authorized to entertain suits at law or in equity removed to that court from state courts, in all cases where the suit arises under the constitution or laws of the United States or under treaties made under their authority; and it was provided that such suits could be removed by either party. The language descriptive of removable cases was thus substantially the same as the language used in defining the original jurisdiction of the court.

### § 322. How Jurisdictional Fact Shown in Removal Cases.

But in interpreting these provisions in respect to the matter of pleading, a distinction was created by the courts. In cases of original jurisdiction it was held that the plaintiff's own statement of his cause of action must show on its face that the suit arose under the constitution, or laws, or under a treaty of the United States.<sup>27</sup> This was in conformity with the rule that has always been applied in regard to cases of original jurisdiction involving the federal question. In regard to removal cases it was held that the circuit court had jurisdiction to entertain the suit if the record at the time of removal showed that either party claimed a right under the constitution or laws of the United States. It followed from this interpretation that the jurisdictional fact could be shown in the petition for removal as well as in the bill, declaration, answer, or plea.<sup>28</sup>

### § 323. Present State of Practice.

It will thus be seen that as regards the mode of presenting the jurisdictional fact, the law was decidedly more liberal in removal cases than in cases of original jurisdiction. And so it continued until the passage of the act of March 3, 1867, c. 373 (as amended by act

<sup>27</sup> *Feibelman v. Packard* (1883) 109 U. S. 421, 27 L. ed. 984; *Kansas, etc. R. Co. v. Atchison, etc. R. Co.* (1884) 112 U. S. 414, 28 L. ed. 794; *New Orleans v. Houston* (1886) 119 U. S. 265, 30 L. ed. 411; *Metcalf v. Watertown* (1888) 128 U. S. 586, 32 L. ed. 543; *Bachrack v. Norton* (1889) 132 U. S. 337, 33 L. ed. 377; *Cooke v. Avery* (1893) 147 U. S. 275, 37 L. ed. 209.      <sup>28</sup> *Railroad Co. v. Mississippi* (1880) 102 U. S. 135, 26 L. ed. 96; *Ames v. Kansas* (1884) 111 U. S. 449, 28 L. ed. 482; *Pacific Railroad Removal Cases* (1885) 115 U. S. 1, 29 L. ed. 319; *Southern Pac. R. Co. v. California* (1886) 118 U. S. 109, 30 L. ed. 103; *Metcalf v. Watertown* (1888) 128 U. S. 589, 32 L. ed. 544.

of Aug. 13, 1888, c. 866). This act limited the right of removal, in all cases, to the defendant or defendants, and in the clause referring to the removal of causes arising under the constitution, laws, or treaties of the United States, the right of removal was expressly limited to causes of which the circuit courts of the United States were given original jurisdiction under the same act. The introduction of this limitation was at once held to change the law in regard to the matter of pleading the jurisdictional fact in removal cases, and on this point the law in original and removal cases was thereby brought into harmony. As it had formerly been held, under the act of 1875, that the circuit court had no original jurisdiction unless the existence of the federal question appeared in the plaintiff's statement of his claim, so now it was held that, in removal cases, the court acquired no jurisdiction unless the existence of the federal question was shown in the plaintiff's bill or declaration.<sup>29</sup> It is even held that resort cannot be had to judicial knowledge in order to raise a controversy under a law of the United States, when the fact that such statute is involved does not appear from the pleadings.<sup>30</sup>

A comparison of what is here said with what is presently to be stated in regard to the averment of the jurisdictional fact in cases where the removal is had on the ground of diversity of citizenship will reveal the existence of a distinction which may be indicated thus: Where the right of removal depends on the character of the parties, as in case of diverse citizenship or alienage, the jurisdictional fact may be shown either in the pleadings, petition for removal, or in any other proper part of the record;<sup>31</sup> but where the right of removal depends on the existence of a federal question, such jurisdictional fact must appear from the plaintiff's own statement of his claim. This same distinction applies of course in cases of original jurisdiction also, and the principle is thus subject to no exception that where jurisdiction depends on the character of the parties the jurisdictional fact may be shown anywhere in the record, but if it depends on the

<sup>29</sup> *Tennessee v. Union and Planters'* 1017; *Gableman v. Peoria etc. R. Co. Bank* (1894) 152 U. S. 454, 38 L. ed. (1900) 179 U. S. 335, 45 L. ed. 220; 511; *Chappell v. Waterworth* (1894) 155 U. S. 102, 39 L. ed. 85; *Postal Tel. Cable Co. v. Alabama* (1894) 155 U. S. 482, 39 L. ed. 231; *United States v. American Bell Tel. Co.* (1898) 159 U. S. 548, 40 L. ed. 255; *Oregon etc. R. Co. v. Skottow* (1901) 180 U. S. 533, 45 L. ed. 656. (1896) 162 U. S. 495, 40 L. ed. 1050; *Pittsburgh etc. R. Co. v. Ramsey Walker v. Collins* (1897) 167 U. S. 57, 42 L. ed. 76; *Galveston etc. R. Co. v. Texas* (1898) 170 U. S. 228, 42 L. ed.

<sup>30</sup> *Mountain View etc. Co. v. McFadden* (1901) 180 U. S. 533, 45 L. ed. 656.

<sup>31</sup> *Pittsburgh etc. R. Co. v. Ramsey Walker v. Collins* (1897) 167 U. S. 57, 42 L. ed. 76; *Galveston etc. R. Co. v. Texas* (1898) 170 U. S. 228, 42 L. ed.



nature of the cause of action, the jurisdictional fact must appear in the plaintiff's statement of his cause.<sup>33</sup>

*Jurisdictional Averment of Citizenship.*

**§ 324. Statement of Citizenship of Parties.**

From the earliest date, the supreme court has reiterated the rule time and again that in order to maintain a suit in a case where jurisdiction depends on the diversity of citizenship of the parties, such diversity of citizenship must clearly appear of record. The averment should be direct and explicit, and the fact of diversity of citizenship will not be inferred from allegations of residence or from the locality in which the suit is brought. It is not sufficient that jurisdiction may be inferred argumentatively from the other averments. The burden of averment or of proof is not on the defendant to defeat jurisdiction by alleging or proving that the parties are citizens of the same state. The plaintiff in order to maintain his suit must be able to put his finger on some part of the record which directly shows the required diversity of citizenship. There is a legal presumption that a case is without the jurisdiction of the court, until the contrary is affirmatively alleged or otherwise shown. As once was observed by Mr. Justice Miller, the supreme court has always been very particular in requiring a distinct statement of the citizenship of the parties, and of the particular state in which it is claimed.<sup>34</sup>

Diversity of citizenship need not be alleged in a case where jurisdiction can be supported on some other ground, as on the fact that the suit involves a controversy under the constitution, laws, or treaties of the United States.<sup>35</sup>

**§ 325. Diversity Must Extend to Every Party.**

It is to be noted that a suit is held not to be based on a controversy between citizens of different states unless it is shown that each of the plaintiffs is capable of suing each and every one of the defendants in the court where the suit is brought.<sup>36</sup> It follows that the bill should

<sup>33</sup> Press Pub. Co. v. Monroe (1896) etc. Co. v. Stanislaus County (1896) 90 164 U. S. 106, 41 L. ed. 367; Spencer v. Fed. 516.

Duplan Silk Co. (1903) 191 U. S. 528, <sup>35</sup> Peninsular Iron Co. v. Stone (1887) 121 U. S. 631, 30 L. ed. 1020; Smith v. 48 L. ed. 287.

<sup>34</sup> Cameron v. Hodges (1888) 127 U. Lyon (1890) 133 U. S. 315, 33 L. ed 635; S. 325, 32 L. ed. 133. Hoe v. Jamieson (1897) 106 U. S. 395.

<sup>36</sup> Ames v. Kansas (1884) 111 U. S. 41 L. ed. 1049; Hepburn v. Ellzey 449, 28 L. ed. 482; Lund v. Chicago etc. (1805) 2 Cranch, 445, 2 L. ed. 332; R. Co. (1897) 78 Fed. 385; San Joaquin Stra'wbridge v. Curtiss (1806) 3 Cranch,

always allege the citizenship of every person who is party to the suit. An averment that a party is a citizen of the District of Columbia or of a territory is not an allegation that he is a citizen of a state, and hence such an averment is insufficient to support jurisdiction.<sup>36</sup>

A general allegation in the body of the bill that the controversy is "between citizens of different states" is a mere conclusion of law and is ineffectual to cure the omission of the necessary averment elsewhere.<sup>37</sup>

### § 326. Citizenship Must Appear in Bill, Answer, or Record.

If in any case where jurisdiction is dependent on diversity of citizenship, the bill fails to show the fact of such diversity, the bill is subject to demurrer and will be dismissed. For this reason we say it is necessary to show the jurisdictional fact in the bill itself. This is required in order to make sure that the bill will withstand criticism. But if, in a case where the jurisdictional fact is not sufficiently stated in the bill, the defendant instead of demurring answers to the merits and in his answer sets forth facts showing that the jurisdiction does exist, the defect in the bill is cured.

Not only this: it further appears that in a case where the bill fails to allege diversity of citizenship and the answer likewise fails to admit the requisite diversity, the defect may yet be cured by reference to other parts of the record, as, for instance, the summons, the petition for removal, or the proof. This, of course, can only happen where the party defendant makes no formal objection at the proper juncture. The supreme court will not dismiss a case, on appeal, on the ground of a want of jurisdiction, if the requisite diversity is shown to exist in any part of the record. Hence the correct formula for the statement of the principle in question is that where the jurisdiction of the court is dependent on diversity of citizenship, the fact of such diversity must appear in some proper part of the record.<sup>38</sup>

267, 2 L. ed. 435; *Barney v. Baltimore* (1869) 9 Wall. 574, 19 L. ed. 751; (1867) 6 Wall. 280, 18 L. ed. 825; *New Orleans v. Winter* (1816) 1 Wheat. 91, 4 L. ed. 44.

<sup>36</sup> *Hoe v. Jamieson* (1897) 166 U. S. 395, 41 L. ed. 1049; *New Orleans v. Winter* (1816) 1 Wheat. 91, 4 L. ed. 44.

<sup>37</sup> *Grace v. Am. Cent. Ins. Co.* (1883) 109 U. S. 278, 27 L. ed. 932.

<sup>38</sup> *Muse v. Arlington* (1897) 168 U. S. 436, 42 L. ed. 533; *Wolfe v. Hartford* (1893) 148 U. S. 389, 37 L. ed. 493; *Roberts v. Lewis* (1892) 144 U. S. 656, 36 L. ed. 582; *Assessor v. Osbornes* (1869) 9 Wall. 574, 19 L. ed. 751; *Marshall v. Baltimore* (1853) 16 How. 340, 14 L. ed. 965; *Bailey v. Dozier* (1848) 6 How. 23, 12 L. ed. 328; *Livingston v. Story* (1837) 1 Pet. 351, 414, 9 L. ed. 746, 771; *Godfrey v. Terry* (1877) 97 U. S. 171, 24 L. ed. 944; *Hornthall v. Keary* (1869) 9 Wall. 560, 19 L. ed. 560; *Jackson v. Ashton* (1834) 8 Pet. 148, 8 L. ed. 898; *Piquignot v. Pennsylvania R. R. Co.* (1853) 16 How. 104, 14 L. ed. 863; *Sullivan v. Fulton Steamboat Co.* (1821) 6 Wheat. 450, 5 L. ed. 302; *Morgan v. Callender* (1808)

What is or is not a proper part of the record to which one may look in determining this point, is a matter of judicial construction, and the only guide is found in the decided cases.

1. *Gordon v. Third National Bank* (1903) 141 U. S. 91, 36 L. ed. 339: The question of jurisdiction being raised for the first time in the supreme court, it was ruled that the summons was such a part of the record as could be looked to in support of the jurisdiction. This commanded the marshal "to summon E. C. Gordon, who is a citizen of the state of Alabama." It was held that this sufficiently showed him to be a citizen of Alabama. The facts showing the requisite diversity of citizenship must appear in such papers as properly constitute the record of the case.

2. *Mexican Central Ry. Co. v. Pickney* (1902) 145 U. S. 194, 37 L. ed. 600: The original petition, declaration, or bill is a part of the record and may be looked to on the question of jurisdiction although an amended petition, declaration, or bill is filed which itself becomes the basis of the suit and which lacks the requisite averment. But where the original pleading contains no sufficient averment of citizenship, the amended pleading must specifically aver citizenship as of the date of the commencement of the suit.<sup>22</sup>

3. *Briggs v. Sperry* (1877) 95 U. S. 491, 24 L. ed. 300: A suit brought in a state court was removed on petition of the defendant to the federal court. In this court the plaintiff filed a new or amended bill which failed to show diversity of citizenship. But it was held that the defect was cured by reference to the state of the record. Said the court: "If nothing else be looked at but the bill, there is no jurisdiction shown. But the proceedings in the state court, which are properly here as part of the record of the case, show that it was removed from the state court to the federal court, on account of the citizenship of the parties; and this of itself must have given jurisdiction to the United States court before the amended bill was filed. That jurisdiction is not lost, because the facts on which it arose are not set out in the old or the new complaint."

4. *Jameau v. Brooks* (1901; C. C. A.) 108 Fed. 353, 48 C. C. A. 397: The declaration failed to show diversity of citizenship, but the fact appeared in the proof and was shown by the bill of exceptions. It was held that this was sufficient. Two circumstances shown in this case should be noted though it does

4 Cranch, 370, 2 L. ed. 650; *Wood v. Wagon* (1804) 2 Cranch, 9, 2 L. ed. 191; *Abercrombie v. Dupuis* (1800) 1 Cranch, 343, 2 L. ed. 129; *Emory v. Grenough* (1797) 3 Dall. 369, 1 L. ed. 640; *Bingham v. Cabot* (1798) 3 Dall. 382, 1 L. ed. 646; *Turner v. Enrille* (1799) 4 Dall. 7, 1 L. ed. 717; *Myers v. Hottinger* (1899) 94 Fed. 370, 37 C. C. A. 309, *affirming* (1897) 81 Fed. 806; *Leavitt v. Cowles* (1841) Fed. Cas. No. 8,171; *Catlett v. Pacific Ins. Co.* (1823) Fed. Cas. No. 2,517; *Merserole v. Union Paper Collar Co.* (1899) Fed. Cas. No. 9,488; *Findlay's Ex'rs v. Bank of United States* (1839) Fed. Cas. No. 4,791.

*Under the Practice of the Circuit Court of the Fifth Circuit*, proof of the diverse citizenship of the parties litigant is not admissible at all unless alleged in the pleadings. *Preferred Accident etc. Co. v. Barker* (1899) 93 Fed. 158, 36 C. C. A. 300. We question whether this usage would be good as a matter of equity practice, for equity practice is uniform and almost wholly subject to decisions of the supreme court.

<sup>22</sup> *Baltimore etc. R. Co. v. McLaughlin* (1890) 73 Fed. 519, 19 C. C. A. 651; *Laskey v. Newtown Min. Co.* (1890) 85 Fed. 695.

not appear that they affected the ruling. In the first place, it was the plaintiff who sought to take advantage of the defect incident to the absence of the jurisdictional averment in his own pleading, and in the second place there had been an order in the trial court allowing the pleadings to be amended so as to show the diversity of citizenship. Though the amendment had not been made, the circuit court of appeals seemed inclined to treat the order as being effective without the actual amendment.

5. *Robertson v. Cease* (1878) 97 U. S. 648, 24 L. ed. 1057: The requisite diversity of citizenship was not averred, but it was insisted that the fact was shown or was inferable from certain documents or papers copied in the transcript. Among these documents was a notice of an application for a commission to examine witnesses, of whom the plaintiff was one. In this notice plaintiff was described as residing in Mason County, Illinois. But it was held that this document was not such a part of the record as could be looked to in order to establish jurisdiction, even if its recitals were sufficient, as they were not. In observing on the untenableness of the contrary contention, the court said: "It involves a misapprehension of our former decisions. When we declared that the record, other than the pleadings, may be referred to in this court, to ascertain the citizenship of parties, we alluded only to such portions of the transcript as properly constituted the record upon which we must base our final judgment, and not to papers which had been improperly inserted in the transcript. Those relied upon here to supply the absence of distinct averments in the pleadings as to the citizenship of Cease, clearly do not constitute any legitimate part of the record. They are not so made either by a bill of exceptions, or by any order of the court referring to them, or in any other mode recognized by the law."

6. *Denny v. Pironi* (1861) 141 U. S. 121, 35 L. ed. 657: The only sufficient allegation of citizenship in the record was found in an order of remittitur entered after judgment. The order showed on its face that it was entered for the sole purpose of introducing the averment of citizenship. It was held that the defect could not be thus cured. Said the court: "The remittitur formed no proper part of the judgment record, and the recital of citizenship formed no proper part of the remittitur. Undoubtedly proceedings subsequent to the judgment are admissible to show what action has been taken upon such judgment, as for instance, that it has been vacated, stayed, amended, modified or paid, that execution has been issued upon it, or that a part of it has been remitted, but such proceedings cannot be introduced to validate a judgment void for the want of jurisdiction."

### § 327. Citizenship of Person Suing in Representative Capacity.

If a plaintiff sues in the capacity of administrator he should state his own citizenship. If the bill fails to contain this statement it is demurrable, though the citizenship of plaintiff's intestate and of the other parties to the record is duly shown. Jurisdiction of a suit brought by an administrator depends on the administrator's citizenship and not on that of his intestate.<sup>40</sup>

<sup>40</sup> *Continental Life Ins. Co. v. Rhoads* (1871) 11 Wall. 172, 20 L. ed. 179; (1886) 119 U. S. 237, 30 L. ed. 380; *Dodge v. Perkins* (1827) 4 Mason, 435, *Susquehanna etc. R. Co. v. Blatchford*

The appointment by a probate court of a nonresident person as administrator does not make him a citizen of the state where the appointment is made in such sense that federal jurisdiction may be predicated thereon. Thus, in a case where jurisdiction depended on diverse citizenship and it appeared that the defendant was a citizen of Maine and that the plaintiff sued as an administrator appointed by a court of New Hampshire, but was himself a citizen of Maine, it was held that jurisdiction did not exist.<sup>41</sup>

Where suit is brought in a federal court by a guardian or next friend in a case where jurisdiction depends on diversity of citizenship, the citizenship of such guardian or next friend must be alleged or otherwise properly shown in the record.<sup>42</sup>

### § 328. Citizenship Should Be Stated in Introduction to Bill.

The proper place for the allegation of citizenship is in the introductory part of the bill;<sup>43</sup> but the allegation will be good if made anywhere in the body of the bill. It is not enough that the averment appears in the title or caption.<sup>44</sup> When the necessary averment of diversity of citizenship is not found in the introductory part of the bill, the court may well insist that counsel should point out the place where it is to be found in the body of the bill. If the allegation is not found in the introductory part, the bill is presumptively defective.<sup>45</sup>

### § 329. What Is Sufficient Averment—Alternative Allegation.

The alternative allegation of citizenship in one state or another is bad. The same is true of an alternative averment that one is a citizen or resident of a particular state.

<sup>41</sup> *Wilson v. Hastings Lumber Co.*, where the plaintiff resides. *Tonopah* (1900) 103 Fed. 801.

<sup>42</sup> *Wormley v. Wormley* (1823) 8 Wheat. 451, 5 L. ed. 659; *Wiggins v. Bethune* (1886) 29 Fed. 61; *Voss v. Neineber* (1895) 68 Fed. 947.

<sup>43</sup> *Muller v. Dows* (1877) 94 U. S. 444, 24 L. ed. 207; *Sharon v. Hill* (1885) 23 Fed. 353.

In stating the defendant's residence or place of abode in compliance with equity rule 20, it is sufficient to allege of a certain defendant, in a bill filed in the district court of Nevada, that such defendant is a citizen and resident of the state of Nevada, and that he is a non-resident of the state of New Jersey

etc. *Co. v. Douglass* (1903) 123 Fed. 936.

<sup>44</sup> *Jackson v. Ashton* (1834) 8 Pet. 148, 8 L. ed. 896; *Livingston v. Story* (1837) 11 Pet. 351, 414, 9 L. ed. 746, 771. But see *Jones v. Andrews* (1870)

10 Wall. 327, 19 L. ed. 935.

<sup>45</sup> *City of Carlsbad v. Tibbetts* (1892) 51 Fed. 852.

Where jurisdiction depends on diverse citizenship, a bill which fails to state the citizenship of the parties is not only defective for violation of equity rule 20, but is demurrable for failure to show jurisdiction. *Harvey v. Richmond etc. R. Co.* (1894) 64 Fed. 19.

1. *Van Horn v. Kittitas Co.* (1901) 112 Fed. 1: Suit was brought in the state of Washington against the members of a partnership who were alleged to be each and all citizens of the United States and citizens of the state of Illinois or of the state of New York. The averment was held to be insufficient. "The allegation is evasive. It does not show that either member of the firm was a citizen of the state of Illinois, nor that either member of the firm was a citizen of the state of New York."

2. *Brown v. Koene* (1834) 8 Pet. 112, 8 L. ed. 885: The averment was that the defendant was a "citizen or resident of the state of Louisiana, holding his fixed and permanent domicile in the parish of St. Charles." This was held not to be sufficient allegation of citizenship in Louisiana. The citizenship of each and every party to the suit must be alleged.

### § 330. Allegation of Residence.

An averment of residence in a certain state or that the party is a resident of that state, or that he lives in that state, is not a sufficient allegation of citizenship in such state. Similarly it has many times been held that the bare allegation that a party is "of" a certain state is not sufficient. It must be shown that the party is a "citizen" of the particular state to which he is attributed.<sup>46</sup> A man may well be a citizen of one state and a resident of another, while merely to say

<sup>46</sup> *Robertson v. Cease* (1878) 97 U. S. 2 L. ed. 191; *Hodgson v. Bowerbank* 646, 24 L. ed. 1057; *Grace v. American* (1899) 5 Cranch, 303, 3 L. ed. 106; *Parcent. Ins. Co.* (1883) 109 U. S. 278, 3 L. ed. 106; *Overman* (1855) 18 How. 127, 15 Sup. Ct. 207, 27 L. ed. 932; *Everhart* L. ed. 318; *Piquet v. Swan* (1828) 5 v. *Huntsville Female College* (1887) Mason, 35; *Jackson v. Ashton* (1834) 8 120 U. S. 223, 7 Sup. Ct. 555, 30 L. ed. 148, 8 L. ed. 898; *Ross v. Duval* 623; *Menard v. Goggan* (1887) 121 U. S. 139, 13 Pet. 45, 10 L. ed. 51; *Wilson v. City Bank* (1836) 3 Sumn. 422; *Anderson v. Watt* (1891) 138 U. S. 694, 34 L. ed. 1078, 1081; *Timmons v. Elyton Land Co.* (1891) 139 U. S. 378, 35 L. ed. 195; *Denny v. Pironi* (1891) 760, 1 C. C. A. 91; *Tinsley v. Hoot* (C. C. A.; 1893) 53 Fed. 682, 3 C. C. A. 612; *Texas, etc. R. Co. v. Rogers* (1893) 57 Fed. 378, 6 C. C. A. 403; *Grand Pac. Co. v. Denton* (1892) 146 U. S. 202, 205, 13 Sup. Ct. 44, 36 L. ed. 942, 1894) 59 Fed. 727, 8 C. C. A. 237; *Tug River Coal & Salt Co. v. Brigel* (C. C. A.; 1895) 67 Fed. 625, 14 C. C. A. 577; *Hoppenstedt v. Fuller* (1895) 71 Fed. 99, 17 C. C. A. 623; *Preferred Acci. Ins. Co. v. Barker* (C. C. A.; 1898) 68 Fed. 814, 32 C. C. A. 124; *Allen B. Wrialey Co. v. George E. Rouse Soap Co.* (1898) 90 Fed. 5, 32 C. C. A. 496, *dismissing appeal* (1898) 87 Fed. 589; *Thomas v. Nat. Bank of D. O. Mills* (1901) 106 Fed. 438, 45 C. C. A. 407; *Gale v. Southern Building & Loan Ass'n* (1902) 117 Fed. 732; *Catlett v. Pacific Ins. Co.* (1903) 1 Cranch, 343, 2 L. ed. 129; *Wood v. Wagon* (1904) 2 Cranch, 2, (1826) Fed. Cas. No. 2,517; *McCloskey*

that a person is "of" a certain state really imports nothing as to his legal relation to that state.

### § 331. Technical Accuracy Not Required—Necessary Legal Inference.

Yet it is not necessary that the allegation of citizenship should be in the precise and proper technical form. All that is necessary is that the bill should fairly show the particular states of which the respective parties are citizens. Where from the facts stated in the record citizenship of the parties in a particular state follows as a necessary legal inference, jurisdiction will be maintained.<sup>47</sup> The inference, however, must be a necessary one. A mere inference of fact is not enough. Thus the citizenship of an executor will not be inferred from the citizenship of his testator.<sup>48</sup>

1. *Gassies v. Bailon* (1832) 6 Pet. 761, 8 L. ed. 573: The defendant was described "as now residing in the parish of West Baton Rouge where [he] the said Pierre Gassies had caused himself to be naturalized as an American citizen." This was held to be equivalent to an averment that the defendant was a citizen of Louisiana.

2. *Bowdurant v. Watson* (1880) 103 U. S. 281, 26 L. ed. 447: A bill in equity, for an injunction to restrain the levy of an execution on a judgment at law, was removed on the petition of the defendant to the federal court. Neither the bill nor the petition contained such an averment of the citizenship of the defendant as would support jurisdiction. The record, however, showed that the defendant was sued as executrix under her husband's will, and that said husband was at the time of his death, and for many years prior thereto had been, a citizen of Mississippi. It followed that she was a citizen of that state at the time of her husband's death. The proof also showed that she was a citizen of Mississippi when her testimony was taken in the cause. There was evidence to show that there had been no change of her citizenship at any time. It was held that her citizenship in Mississippi was sufficiently shown by the record. "Whether the petition avers the fact or not is immaterial, provided the fact is shown to exist by any part of the record."

3. *Dwyer v. Webb* (1816) Fed. Cas. No. 4,198: The defendant was described

*v. Cobb* (1866) Fed. Cas. No. 8,702; citizens of those states. The decision *Evans v. Davenport* (1849) Fed. Cas. No. 4,568; *Teese v. Phelps* (1866) Fed. Cas. No. 13,818. appears not to be in conformity with other decisions. A man may be a citizen of the United States and of the state of New York and yet may reside in New Jersey. Residence is no evidence of citizenship.

In *Littell v. Erie R. Co.* (1900) 105 Fed. 536, the allegation in the complaint was that the plaintiff "now is, and at all times hereinafter mentioned was, a citizen of the United States and an actual resident of the state of New Jersey." This was held to be a sufficient averment of citizenship in New Jersey, since citizens of the United States residing in any of the states are

<sup>47</sup> *Jones v. Andrews* (1870) 10 Wall. 327, 19 L. ed. 935; *Bayerque v. Haley* (1866) Fed. Cas. No. 1,135.

<sup>48</sup> *Continental Ins. Co. v. Rhoads* (1886) 119 U. S. 237, 30 L. ed. 342; *Hapgood v. Hewitt* (1882) 11 Fed. 422.

as a citizen of the United States and as sheriff of Windham County, Connecticut, also as residing in the town and county of Windham. This was held to be a sufficient averment of citizenship in Connecticut. Here the defendant was described as exercising an office which none but a citizen of the state could be presumed to be capable of exercising.

4. *Borlin v. Jones* (1871) 1 Woods, 638, Fed. Cas. No. 1,343: An averment that a party is "a citizen of the southern district of Alabama" is a sufficient allegation that he is a citizen of Alabama.<sup>49</sup>

### § 332. Judicial Notice that State Member of Union.

In averring citizenship it is sufficient to name the state of which the party is alleged to be a citizen without alleging such state to be one of the United States. Judicial notice will be taken of this.<sup>50</sup>

### § 333. Citizenship Unknown.

Clearly a bill fails to show jurisdiction where it alleges that the citizenship of some of the parties is unknown; *a fortiori* where it alleges that the place of their residence is unknown and makes no allegation of citizenship at all.

*Tug River etc. Co. v. Brigel* (1895; C. C. A.) 67 Fed. 625, 14 C. C. A. 577: Bill in equity to foreclose a mortgage on real estate. Jurisdiction was dependent on diversity of citizenship, yet it was alleged concerning certain necessary parties defendant that their residence and place of business was unknown. Nor was there any averment of the state of their citizenship. It was held that the bill showed a want of jurisdiction.<sup>51</sup>

### § 334. Change of Citizenship after Suit Brought.

The citizenship of the parties is to be determined as of the date of the commencement of the suit, and hence the court does not lose or acquire jurisdiction by reason of any change in citizenship during the pendency of the suit.<sup>52</sup> It follows that, generally speaking, the allegation of citizenship must refer to the date of the commencement of the suit; and an amended pleading is defective which alleges citizenship as of the date of the filing of the amendment. It should refer to the time of the beginning of the suit.<sup>53</sup>

<sup>49</sup> *Edwards v. Nichols* (1806) Bruz. (1891) 136 U. S. 604, 34 L. ed. 1078; *ner, Col. Cas.* 43, 3 Day, 16, Fed. Cas. Mexican Cent. R. Co. v. Pinkney (1893) No. 4,296. 149 U. S. 194, 37 L. ed. 699; *Conolly v.*

<sup>50</sup> *Wright v. Hollingsworth* (1828) 1 Taylor (1829) 2 Pet. 556, 7 L. ed. 516; *Pet.* 166, 7 L. ed. 90. *Mollan v. Torrance* (1824) 9 Wheat.

<sup>51</sup> *Speigle v. Meredith* (1868) 4 Biss. 537, 6 L. ed. 154; *Chicago Lumber Co.* 120; *Conwell v. White Water, etc. Co. v. Comstock* (1896) 71 Fed. 477, 18 C. (1868) Fed. Cas. No. 3,148, 4 Biss. 195. C. A. 207.

<sup>52</sup> *Jackson v. Allen* (1889) 132 U. S. 53; *Laskey v. Newtown Mining Co.* 27, 33 L. ed. 249; *Anderson v. Watt* (1893) 56 Fed. 628.

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### § 335. Determination of Citizenship—Burden of Proof.

The issue on the question whether the necessary diversity of citizenship exists in a given case is entirely distinct from the question of the merits of the controversy, and it should be separately determined. Where the allegations as to citizenship are sufficient, but such allegations are denied in the answer, the burden of showing want of proper citizenship is on the defendant; or, as it is otherwise stated, where the plaintiff's pleading sets out the necessary diversity of citizenship, the burden both of allegation and proof rests on the party who seeks to defeat jurisdiction.<sup>54</sup>

### § 336. Determination of Question on Proof at Hearing.

Where jurisdiction is dependent on diverse citizenship and the bill contains sufficient allegations on this point, and no question is raised till the hearing, the fact of citizenship is to be tried on the proof properly adduced. Evidence supporting the allegations of the bill on this point cannot be controverted by *ex parte* affidavits.<sup>55</sup>

### *Averment of Citizenship in Suits by or against Corporations and Limited Companies.*

### § 337. Corporation Suing as Citizen of State.

Where jurisdiction is dependent on citizenship and one of the parties appears to be a corporation, a question of some subtlety arises. The judiciary act, it will be noted, confers jurisdiction on the circuit court to entertain suits arising out of controversies between *citizens* of different states. Can a corporation be a citizen of any state in the sense of this act? The corporation is a legal person, to be sure, but it evidently has not such a personality as is capable of being endowed with all the attributes of a citizen. A corporation cannot be a citizen in any literal and true sense. This being admitted, it would seem naturally to follow that jurisdiction must fail where the controversy is between a corporation of one state and an individual of another state. But by the settled doctrine of the supreme court it is estab-

<sup>54</sup> *Foster v. Cleveland, etc. R. Co.* challenged by proper plea, the issue is (1893) 56 Fed. 434; *National Masonic, an independent one and should not be etc. Assoc. v. Sparks* (1897) 53 Fed. confused with the issue on the merits, 225, 28 C. C. A. 399; *Terry v. Davy* otherwise the verdict would not show (1901) 107 Fed. 50, 46 C. C. A. 141. whether it was founded on the cause of *In Ashley v. Board* (1893) 60 Fed. 55, action or on the point of jurisdiction. § C. C. A. 455, it was observed that <sup>55</sup> *Kilgore v. Norman* (1902) 119 Fed. when the jurisdiction of the court is 1004.

lished that the term citizen as used in the judiciary act includes corporations as well as natural persons. This end was reached by looking through the form of the corporate entity and considering the fact that the corporation really represents the individuals composing it. In other words, the term citizen in the judiciary act is understood as applying to the real persons who come into court under the corporate name.

### § 338. Early Doctrine.

In the early case where this question was first considered, Marshall, C. J., said: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the Union."<sup>56</sup> The conclusion in that case was that a corporation could sue and be sued in the courts of the Union where diversity of citizenship existed, and the allegation of citizenship was taken as referring to the citizenship of the persons composing the corporation.<sup>57</sup>

### § 339. Presumption as to Citizenship of Stockholders.

Moreover, it was accepted that where a corporation was alleged to have been incorporated in a particular state, there was a legal presumption that the stockholders were citizens of that state. But this presumption was subject to rebuttal. Consequently, if a corporation sued or was sued in any federal court in a case where jurisdiction was dependent on diversity of citizenship, the jurisdiction could be defeated by plea and proof to the effect that only one or more of the stockholders was a citizen of the same state as the adversary of the corporation.<sup>58</sup> This was evidently a very unsatisfactory state of the law. A way out of the difficulty was finally found in a ruling to the effect that all the stockholders of the corporation must be conclusively presumed to be citizens of the state under whose laws the corporation is created.

<sup>56</sup> *The Bank of The United States v. Deveaux* (1809) 5 Cranch, 61, 86, 3 L. ed. 38, 44.      <sup>58</sup> *Commercial etc. Bank v. Slocomb* (1840) 14 Pet. 60, 10 L. ed. 254.

<sup>57</sup> *The Hope Ins. Co. v. Boardman* (1809) 5 Cranch, 57, 3 L. ed. 38.

*Muller v. Dows* (1876) 94 U. S. 444, 24 L. ed. 207. Mr. Justice Strong said: "A corporation itself can be a citizen of no state in the sense in which the word 'citizen' is used in the Constitution of the United States. A suit may be brought in the federal courts by or against a corporation, but in such a case it is regarded as a suit brought by or against the stockholders of the corporation; and, for the purposes of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the state which, by its laws, created the corporation. It is, therefore, necessary that it be made to appear that the artificial being was brought into existence by the law of some state other than that of which the adverse party is a citizen."

### § 340. Present Practice—Corporation Treated as Citizen.

The effect of this was substantially to impeach the earlier doctrine, and as a result it has become the settled rule that, for the purpose of suing and being sued in the courts of the United States, a corporation created and existing under the laws of any state is to be taken and considered as a citizen of that state like any natural person.<sup>59</sup>

### § 341. Mode of Pleading.

Though the corporation is thus treated as being to all intents and purposes a citizen of the state to which it is attributed, it is nevertheless true that an averment to the effect merely that the corporation is a citizen of that state is bad pleading, for it is merely a legal conclusion. The allegation should be that the party in question is a corporation created by and existing under and by virtue of the laws of that state.<sup>60</sup> This averment should be in the introduction or in the stating part of the bill and not in the caption.<sup>61</sup>

### § 342. Sufficient Averments as to Citizenship of Corporations.

Any expression substantially equivalent to that just indicated will be sufficient. All that is necessary is that it should appear from the

<sup>59</sup> *Steamship Co. v. Tugman* (1882) 8. 153, 39 L. ed. 654; *Wabash Western* 106 U. S. 116, 27 L. ed. 87; *Petri v. R. Co. v. Brow* (1896) 164 U. S. 271, 41 L. ed. 431; *Louisville, etc. R. Co. v. Letson* (1844) 2 How. 497, 11 L. ed. 353; *James* (1896) 161 U. S. 545, 40 L. ed. 802; *Es p. Jones* (1897) 164 U. S. 691, 41 L. ed. 601; *Barrow Steamship Co. v. Kane* (1898) 170 U. S. 100, 106, 42 L. ed. 964, 966; *Marshall v. Baltimore, etc. R. Co.* (1853) 16 How. 314, 329, 14 L. ed. 953, 959; *Louisville, etc. R. Co. v. Letson* (1844) 2 How. 497, 558, 11 L. ed. 353, 377.

<sup>60</sup> *Kansas City, etc. R. Co. v. Daugherty* (1891) 138 U. S. 301, 34 L. ed. 964; *Neel v. Pennsylvania Co.* (1895) 157 U. S. 444, 445, 24 L. ed. 207, 208; *Mexico*

*R. Co. v. Brow* (1896) 164 U. S. 271, 41 L. ed. 431; *Louisville, etc. R. Co. v. Letson* (1844) 2 How. 497, 11 L. ed. 353; *James* (1896) 161 U. S. 545, 40 L. ed. 802; *Es p. Jones* (1897) 164 U. S. 691, 41 L. ed. 601; *Barrow Steamship Co. v. Kane* (1898) 170 U. S. 100, 106, 42 L. ed. 964, 966; *Marshall v. Baltimore, etc. R. Co.* (1853) 16 How. 314, 329, 14 L. ed. 953, 959; *Louisville, etc. R. Co. v. Letson* (1844) 2 How. 497, 558, 11 L. ed. 353, 377.

<sup>61</sup> *Muller v. Dows* (1876) 94 U. S. 444, 445, 24 L. ed. 207, 208; *Mexico*

averment that the corporation has a legal existence under the laws of a particular state. The following expressions have been upheld as adequate averments of the citizenship of a corporation: "A corporation organized and domiciled in the state of New York;"<sup>62</sup> "a foreign corporation formed under and created by the laws of New York;"<sup>63</sup> "an association of persons duly incorporated under the laws of Maryland;"<sup>64</sup> "a corporation organized under and pursuant to the laws of the state of New Jersey."<sup>65</sup>

### § 343. Insufficient Allegations of Corporate Citizenship.

The following descriptive expressions have been held to be insufficient averments of corporate citizenship, to wit: "The American Sugar Refining Company, a citizen of New Jersey;"<sup>66</sup> "The Travelers' Insurance Company, a citizen of the state of Connecticut;"<sup>67</sup> "The Postal Telegraph Cable Company, a New York corporation;"<sup>68</sup> "The Milwaukee Mechanics' Insurance Company,

*Southern Bank v. Reed* (1879) Fed. Cas. No. 9,514.

<sup>62</sup> *Ward v. Blake Manuf'g Co.* (1893) 56 Fed. 437, 5 C. C. A. 538.

<sup>63</sup> *United States Express Co. v. Kountze* (1899) 8 Wall. 342, 19 L. ed. 457.

<sup>64</sup> *Baltimore & O. R. Co. v. McLaughlin* (1896) 73 Fed. 519, 19 C. C. A. 551.

<sup>65</sup> *Block v. Standard Distilling & Distributing Co.* (1899) 95 Fed. 978.

For other decisions based on the same principle as those specifically noted above, see *Blackburn v. Selma, etc. R. Co.* (1879) 2 Flipp. 525; *New York, etc. R. Co. v. Shepard* (1853) 5 McLean, 455; *Marshall v. Baltimore, etc. R. Co.* (1853) 16 How. 314, 14 L. ed. 953; *Philadelphia, etc. R. Co. v. Quigley* (1858) 21 How. 202, 16 L. ed. 73; *Covington Drawbridge Co. v. Shepherd* (1858) 21 How. 112, 16 L. ed. 38; *Baltimore, etc. R. Co. v. McLaughlin* (1896) 19 C. C. A. 551, 73 Fed. 519; *Betancourt v. Mut. Reserve, etc. Assn.* (1900) 101 Fed. 305; *Mexico Southern Bank v. Reed* (1879) Fed. Cas. No. 9,514.

<sup>66</sup> *American Sugar-Refining Co. v. Johnson* (1893) 60 Fed. 503, 9 C. C. A. 110; *American Sugar-Refining Co. v. Tatum* (1893) 60 Fed. 514, 9 C. C. A. 121.

<sup>67</sup> *De Loy v. Travelers' Ins. Co.* (1893) 59 Fed. 319. To the same effect see *Frisbie v. Chesapeake & Ohio Ry. Co.* (1893) 67 Fed. 1. In *Loungan v. Illi-*

*nois Cent. R. Co.* (1893) 55 Fed. 550, it was said: "It is settled that a corporation is not, strictly speaking, a citizen; and therefore, to sustain a suit by or against a corporation in the federal courts, it is regarded as a suit by or against the stockholders of the corporation, and for jurisdictional purposes it is conclusively presumed that the stockholders are citizens of the state under whose laws the corporation is created. In other words, if it is averred in a given case that a corporation is created under the laws of a named state, the court will indulge in the legal presumption that all the stockholders are citizens of the named state, and that as citizens of such state they may sue or be sued in the corporate name. The jurisdiction is based upon the assumed citizenship of the stockholders; and to give rise to this legal assumption it must be averred, and in case of contest it must be proved, of what state the corporation is a creation."

In *Lumber Co. v. Comstock* (1896) 71 Fed. 477, 18 C. C. A. 207, the circuit court of appeals of the seventh circuit held that the description of a corporation as "a citizen of the state of Illinois" was sufficient to sustain jurisdiction, where no demurrer and no plea in abatement had been filed in the court below.

<sup>68</sup> *Pacific Postal Tel. Cable Co. v. Irvine* (1892) 49 Fed. 113.

a corporation, citizen, and resident of the state of Wisconsin;"<sup>69</sup> "The Quicksilver Mining Company, a body politic in the law of, and doing business in, the state of California;"<sup>70</sup> "The Texas Pacific Railway Company, a corporation operating a railway as a common carrier in the state of Texas;"<sup>71</sup> "The New York and New England Railroad Company, a corporation duly established by law and having its principal place of business in Boston, Massachusetts."<sup>72</sup>

The allegation that an alleged corporation is doing business in a particular state is, of course, insufficient to show its citizenship in that state;<sup>73</sup> and, *a fortiori*, a straddling averment asserting that the defendant claims to be a corporation organized under the laws of a particular state but which at the same time questions its rights as such a corporation, is clearly bad.<sup>74</sup>

#### § 344. Corporation Domesticated in Foreign State.

The presumption that a corporation is composed of citizens of the state that originally created it accompanies the corporation when it does business in another state, and it may sue or be sued in the federal courts in such other state as a citizen of the state of its original creation. Furthermore, this doctrine is so applied that, for jurisdictional purposes, a corporation is still considered a citizen of the state of its original creation, though another state in which it operates or does business has endowed it, for local purposes, with the powers and privileges of a domestic corporation.<sup>75</sup> But where the allegation is in effect one of joint concurrent incorporation by two states, there the corporation will be treated as being a citizen of both states or of either.

*St. Joseph etc. R. Co. v. Steele* (1897) 167 U. S. 659, 42 L. ed. 315: The bill was filed by the plaintiff railroad company against a citizen of Kansas. There

<sup>69</sup> *Dalton v. Milwaukee etc. Ins. Co.* (1902) 118 Fed. 876. <sup>75</sup> *St. Louis etc. Ry. Co. v. James* (1896) 161 U. S. 545, 40 L. ed. 802;

<sup>70</sup> *Pennsylvania v. Quicksilver Mining Co.* (1870) 10 Wall. 553, 19 L. ed. 998. *United States v. Northwestern Express Co.* (1897) 164 U. S. 680, 41 L. ed. 600.

<sup>71</sup> *St. Louis, I. M. & S. Ry. Co. v. Newcom* (1893) 56 Fed. 951, 6 C. C. A. 172. *See Barrow Steamship Co. v. Kane* (1898) 170 U. S. 107, 42 L. ed. 967.

<sup>72</sup> *New York & N. E. R. Co. v. Hyde* (C. C. A.; 1893) 56 Fed. 188, 5 C. C. A. 461. *Compare Memphis etc. R. Co. v. Alabama* (1882) 107 U. S. 581, 27 L. ed. 518; *Clark v. Barnard* (1882) 108 U. S. 452, 27 L. ed. 786; *Goodlett v. Louisville etc. R. Co.* (1887) 122 U. S. 404, 30 L. ed. 145 U. S. 451, 36 L. ed. 772.

<sup>73</sup> *Brock v. Northwestern Fuel Co.* (1889) 130 U. S. 342, 32 L. ed. 906; *Germania Fire Ins. Co. v. Francis* (1870) 11 Wall. 210, 20 L. ed. 77.

<sup>74</sup> *Lownsdale v. Gray's Harbor Boom Co.* (1902) 117 Fed. 983.

was an averment that the company was a corporation created by and subsisting under the laws of Kansas and Nebraska. It was held that the bill failed to show diversity of citizenship.

### § 345. Citizenship of Parties Forming Limited Partnership.

Limited partnerships and joint stock companies created under special laws of the several states are not generally endowed with such corporate character as to permit of their suing or being sued otherwise than by joining all the members. Hence, where jurisdiction is dependent on diversity of citizenship, the citizenship of all must be alleged.<sup>76</sup>

Even where a state statute confers on a limited partnership association the right of suing and being sued in the partnership name, this privilege cannot be made effectual in the federal courts in a case where jurisdiction depends on diversity of citizenship, for the reason that it cannot be averred of a firm that it, as a firm, is a citizen of any state.<sup>77</sup> Only persons, individual or artificial, can be said to have citizenship. It embodied a considerable strain on legal theory to hold that the artificial being known as a corporation could be a citizen within the meaning of the federal statutes conferring jurisdiction on the United States courts, and even that conclusion was reached by indirection and subterfuge. Further than this the federal courts are reluctant to go. "That rule must not be extended. We are unwilling," emphatically say the supreme court, "to extend it to embrace partnership associations."<sup>78</sup>

### *Averment of Citizenship in Suit Brought by Assignee.*

### § 346. Citizenship of Original Holder of Chose in Action.

In most cases where jurisdiction is grounded on the fact of diverse citizenship, only the citizenship of the actual parties to the suit needs

<sup>76</sup> *Chapman v. Barney* (1889) 129 U. S. 677, 32 L. ed. 809; *Great Southern Hotel Co. v. Jones* (1902) 54 C. C. A. 165, 118 Fed. 799; *Fire Proof Hotel Co. v. Jones* (1900) 177 U. S. 449, 44 L. ed. 842; *Turner v. Dinamore v. Philadelphia, etc. R. Co.* (1875) Fed. Cas. No. 3,921. *Contra Bank of North America* (1799) 4 Dall. 8, 1 L. ed. 718; *Fargo v. Louisville, etc. R. Co.* (1881) 6 Fed. 787; *Baltimore, etc. R. Co. v. Adams Express Co.* (1884) 23 Fed. 404; *Adams v. May* (1886) 27 Fed. 907; *Imperial Refining Co. v. Wyman* (1889) 3 L.R.A. 503, 38 Fed. 574; *Carnegie v. Hulbert* (1892) 3 C. C. A. 391, 53 Fed. 10; *Ralya Market Co. v. Armour Co.* (1900) 102 Fed. 533; *Great Southern Hotel Co. v. Jones* (1902) 54 C. C. A. 165, 118 Fed. 799; *and incorrect*, *Andrews Bros. Co. v. Youngstown Coke Co.* (1898) 86 Fed. 585, 30 C. C. A. 293, 58 U. S. App. 444; *Youngstown Coke Co. v. Andrews Bros. Co.* (1897) 79 Fed. 669.

<sup>77</sup> *Ralya Market Co. v. Armour & Co.* (1900) 102 Fed. 530, 533.

<sup>78</sup> *Great Southern Hotel Co. v. Jones* (1900) 177 U. S. 457, 44 L. ed. 845.

to be taken into consideration. There is one class of cases, however, where the citizenship of a person or persons not parties to the record may become material. Such a situation arises when suit is brought by an assignee, or transferee, to recover the contents of any promissory note or chose in action (other than a foreign bill of exchange). Before such a suit can be maintained in a federal court on the ground of diversity of citizenship, it must appear that the suit could have been maintained if no assignment or transfer had been made. The same rule governs suits brought by the holder of negotiable instruments (other than those issued by corporations) which are made payable to bearer.<sup>79</sup> In all these cases the citizenship of the original payee, holder, or owner of the chose in action is material and hence must be averred in the pleadings or otherwise shown in the record.<sup>80</sup> If there are more than one of these original payees, holders, or owners of the chose, the citizenship of all of them must be averred.<sup>81</sup>

#### § 347. Averment Must Refer to Time of Suit Brought.

Furthermore, it is to be observed, the averment concerning the citizenship of these persons must speak as of the date of the institution of the suit. A showing that the suit might have been maintained by such original payee, holder, or owner, at the time when the plaintiff acquired the note or chose is not sufficient.<sup>82</sup> Their citizenship

<sup>79</sup> Act of March 3, 1887, ch. 373, sec. 1, as corrected by Act of Aug. 13, 1888, ch. 866, sec. 1; 4 Fed. Stat. Ann. 286.

<sup>80</sup> *Marine, etc. Min. & Mfg. Co. v. Bradley* (1881) 105 U. S. 175, 26 L. ed. 1034; *King Iron Bridge Co. v. Otoo County* (1887) 120 U. S. 225, 30 L. ed. 623; *Brock v. Northwestern Fuel Co.* (1889) 130 U. S. 341, 9 Sup. Ct. 552, 32 L. ed. 905; *Glass v. Concordia Parish Police Jury* (1900) 176 U. S. 207, 44 L. ed. 436; *North American Transp. etc. Co. v. Morrison* (1900) 178 U. S. 262, 44 L. ed. 1061; *Shuford v. Cain* (1909) 1 Abb. (U. S.) 302; *Montalet v. Murray* (1907) 4 Cranch, 46, 2 L. ed. 545; *Turner v. Bank of North America* (1799) 4 Dall. 8, 1 L. ed. 718; *Donaldson v. Hazen* (1840) Hempst. 423; *Campbell v. Jordan* (1847) Hempst. 534; *Bailey v. Dozier* (1848) 6 How. 23, 12 L. ed. 328; *Bayerque v. Haley* (1856) McAll. 97; *Rogers v. Linn* (1840) 2 McLean, 126; *Fry v. Rousseau* (1842) 3 McLean, 106; *Fletcher v. Turner* (1853) 5 Mc-

*Lean*, 468; *Gibson v. Chew* (1842) 16 Pet. 315, 10 L. ed. 977; *Bradley v. Rhines* (1889) 8 Wall. 393, 19 L. ed. 467; *Morgan v. Gay* (1873) 19 Wall. 81. 22 L. ed. 100; *Mollan v. Torrance* (1824) 9 Wheat. 537, 6 L. ed. 154; *Brown v. Noyes* (1846) 2 Woodb. & M. 75; *Stanley v. Albany County* (1880) 5 Fed. 254; *Hampton v. Truckee Canal Co.* (1883) 19 Fed. 1; *Raisin v. Fertilizer Co. v. Snell* (1884) 21 Fed. 353; *Stanton v. Shipley* (1886) 27 Fed. 408; *Republic Iron Min. Co. v. Jones* (1889) 37 Fed. 721, 2 L.R.A. 746; *Hudson v. Bishop* (1889) 38 Fed. 680; *U. S. Nat. Bank v. McNair* (1893) 56 Fed. 323; *Benjamin v. New Orleans* (C. C. A.; 1896) 20 C. C. A. 591, 74 Fed. 417 (1896) 71 Fed. 758; *Smith v. Fifield* (C. C. A.; 1899) 23 C. C. A. 681, 91 Fed. 561.

<sup>81</sup> *Hampton v. Truckee Canal Co.* (1883) 19 Fed. 1.

<sup>82</sup> *Benjamin v. New Orleans* (1896) 71 Fed. 758.

must be shown as of the date of the filing of the bill and the particular states of which they were citizens at that time must likewise be averred.<sup>83</sup>

**§ 348. Plaintiff's Citizenship in Suits Brought by Assignee.**

The reader will also note the fact that, notwithstanding the citizenship of the original payee, holder, or owner of the chose, is material on the question of jurisdiction and must be affirmatively shown, the citizenship of the actual plaintiff is not thereby made any the less important. There must be diversity of citizenship as between him and his adversary as well as between the original payee, holder, or owner, and such adversary. It follows that in all suits of this kind two conditions as regards the question of citizenship must be fulfilled. The plaintiff must show that he is entitled in his own right and by virtue of his own citizenship to maintain the suit and also that the assignor could have maintained that suit if no assignment or transfer had been made.<sup>84</sup> This principle is tacitly assumed in the cases and necessarily follows from a proper interpretation of the judiciary act. The clause in question embodies an additional limitation on the right of parties, having diverse citizenship, to sue, and could not be construed as dispensing with diversity of citizenship on the part of the actual plaintiff.

<sup>83</sup> *Benjamin v. New Orleans* (1896) 74 Fed. 417, 20 C. C. A. 591.

<sup>84</sup> *Betzoldt v. American Ins. Co.* (1891) 47 Fed. 705.



## CHAPTER VIII.

### JURISDICTIONAL AVERMENT (*continued*).

#### *Averment of Citizenship in Suits between Citizens and Aliens.*

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- 350. Proper Form of Allegation.
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*Averment of Citizenship in Suits between Citizens and Aliens.*

## § 349. Averment of Alienage.

The Judiciary Act confers on the circuit court, jurisdiction over controversies "between citizens of a state and foreign states, citizens, or subjects."<sup>1</sup> In applying this clause substantially the same principles are applicable in respect to the sufficiency of the allegations of the pleadings as are applied in cases where the controversy is between citizens of different states. The jurisdictional fact must be affirmatively shown. One party must be shown to be a citizen of some particular state; the other must be shown to be a foreign state, citizen, or subject; and if there are numerous parties all on one side must be citizens and all on the other must be either foreign states, citizens, or subjects.<sup>2</sup> In the cases the term alien is generally used to indicate the character of the foreign citizen or subject who is party to the suit.

## § 350. Proper Form of Allegation.

A proper form in which to allege alienage is to aver that the party in question is an alien and that he is the subject of some particular

<sup>1</sup> 25 Stat. L. 434. (1800) 4 Dall. 12, 1 L. ed. 720; *Le*  
*Jackson v. Twentyman* (1829) 2 *Croix v. May* (1883) 15 Fed. 236; *Bishop*  
*Pet.* 136, 7 L. ed. 374; *Bears v. Preston* *v. Averill* (C. C.; 1896) 76 Fed. 386;  
 (1884) 111 U. S. 252, 28 L. ed. 419; *Jennes v. Landes* (1897) 84 Fed. 73;  
*Piequet v. Swan* (1828) 5 *Mason*, 35, Compare *Grand Trunk Ry. Co. v. Ten-*  
*Fed. Cas.* No. 11,134; *Wilson v. City* *nant* (1896) 14 C. C. A. 190, 66 Fed.  
*Bank* (1838) 3 *Sumn.* 422, *Fed. Cas.* 922.  
 No. 17,797; *Mosaman v. Higginson*

foreign sovereign,<sup>3</sup> or, in case of a foreign republic, that he is a citizen of such republic.<sup>4</sup> But where it is stated that a party is a subject of some particular foreign sovereign, it is not, in strictness, necessary also to add that he is an alien, for this fact is a conclusion of law and follows by necessary legal intendment.<sup>5</sup>

### § 351. Foreign Corporation.

It is sufficient to say of a foreign corporation that it is a "corporation duly incorporated under the laws of Great Britain." Here the fact of alienage follows as a necessary legal conclusion.<sup>6</sup>

### § 352. Insufficient Averment of Alienage.

Alienage is not shown by merely describing a party as being "a citizen of London, England,"<sup>7</sup> or by describing him as a consul, in this country, of a foreign government.<sup>8</sup> In these cases the conclusion is merely inference of fact and it is not a necessary inference. Similarly, to say of a plaintiff that he is a resident of Ontario, Canada, and a citizen of the Dominion of Canada and of the Empire of Great Britain, is not sufficient.<sup>9</sup> The averment should be that he is a subject of the King, or Queen, of England.

### § 353. Naturalization of Foreign Person.

After a federal court has once acquired jurisdiction over a controversy by reason of the alienage of a particular party, it does not lose jurisdiction by reason of the subsequent naturalization of that party.<sup>10</sup>

#### *Averment of Amount in Controversy.*

### § 354. Jurisdiction as Affected by Amount in Controversy.

We have thus far considered the subject of the jurisdictional averment in connection with three types of cases over which the circuit

<sup>3</sup> *Hodgson v. Bowerbank* (1809) 5 212, Fed. Cas. No. 9,617. *Contra*, *Mich. Cranch*, 303, 3 L. ed. 108; *Bradstreet v. Nelson v. Denison* (1808) 3 Day, 294, Thomas (1838) 12 Pet. 59, 62, 9 L. ed. Fed. Cas. No. 9,523.

<sup>4</sup> *999, 1000; Waters v. Barril* (1868) 131 U. S. lxxxiv, Appx. 18 L. ed. 878. <sup>5</sup> *Dundee Mortgage etc. Co. v. School* Dist. No. 1 (1884) 21 Fed. 152.

<sup>6</sup> *Hennessy v. Richardson Drug Co.* (1903) 23 Sup. Ct. 532, 189 U. S. 25, 47 L. ed. 697, 103 Off. Gaz. 1681; *Hennessy v. Moise* (1903) 23 Sup. Ct. 534, 189 U. S. 35, 47 L. ed. 698; *Hennessy v. May* (1903) 189 U. S. 35, 47 L. ed. 698. <sup>7</sup> *Stuart v. City of Easton* (1895) 15 Sup. Ct. 268, 186 U. S. 46, 39 L. ed. 341.

<sup>8</sup> *Börs v. Preston* (1884) 111 U. S. 252, 28 L. ed. 419. <sup>9</sup> *Rondot v. Township of Rogers* (1897) 25 C. C. A. 145, 79 Fed. 876.

<sup>10</sup> *Betzoldt v. American Ins. Co.* <sup>11</sup> *Milne v. Huber* (1843) 3 McLean, (1891) 47 Fed. 705.

court has jurisdiction. These are respectively (1) suits arising under the constitution, laws, or treaties of the United States, (2) suits arising out of controversies between citizens of different states, and (3) suits arising out of controversies between citizens of a state and foreign states, citizens, or subjects. Now in the three classes or groups of cases above enumerated, the jurisdiction of the circuit court is further limited by the requirement that the matter in dispute shall exceed the sum or value of two thousand dollars. In discussions arising under this provision the terms "amount in controversy" or "value in controversy" are used as the equivalent of the words "matter in dispute" found in the statute. "Amount in controversy" is more particularly applicable in suits based on a money charge. In litigation over property or intangible rights, it is the value of the thing in controversy that determines the jurisdiction.

The question whether the amount or value in controversy is sufficient to give jurisdiction under the statute has arisen in a vast number of cases. In most of these cases the question, as it has arisen and as it has been discussed, is a question of substantive law, the point usually being this, namely, whether under the facts shown in the record the court has jurisdiction to entertain the suit and give judgment on the facts shown by the record. As a mere matter of pleading, the points to be noticed are few and apparently simple, but the subject is one in which matters of substantive law and of pleading are closely interwoven, and almost all of the decisions could without much impropriety be considered under the head of pleading and practice. In the following pages we shall consider only those cases strictly concerned with the rules of pleading and practice or that shed light on those rules.

### § 355. Averment in Suit Based on Money Demand.

In all cases where the suit is based on a money claim, the plaintiff's bill, declaration, petition, or libel should show on its face and by proper averments that the amount or value in controversy exceeds the sum of two thousand dollars.<sup>11</sup> The same rule applies at law,

<sup>11</sup> *Scott v. Donald* (1897) 165 U. S. 673; *Pliable Shoe Co. v. Bryant* (C. C.; 107, 41 L. ed. 648; *Building & Loan* 1897) 81 Fed. 521; *Harvey v. Raleigh & Assoc. v. Price* (1898) 109 U. S. 45, 42 L. G. R. Co. (1898) 89 Fed. 115; *Home Ins. ed. 655; United States v. Pratt Coal & Co. v. Nobles* (C. C.; 1894) 63 Fed. 641; *Coke Co.* (1883) 18 Fed. 708; *Johnston Kenyon v. Knipe* (1891) 46 Fed. 309; *v. Trippe* (1887) 33 Fed. 530; *Yellow Reese v. Zinn* (1900) 103 Fed. 97; *Aster Min. & Mill. Co. v. Winchell Adams v. Douglas County* (1863) Fed. (1899) 95 Fed. 213; *Back v. Sierra Nevada Consol. Min. Co.* (1891) 46 Fed. Fed. Cas. No. 8,073; *Culver v. Crawford*

in equity, and in admiralty proceedings. "Where the claim is founded on dollars and cents, whether it be a libel, a bill in chancery, or an action at law, the damages must appear, to give jurisdiction, on the face of the pleading in which the claim is made."<sup>12</sup>

### § 356. Allegation Inserted in Stating Part of Bill.

The nature of the jurisdictional averment as regards the amount in controversy is such that, whenever necessary to be alleged in the pleadings, it is properly inserted in the stating part of the bill. It is not practicable or proper to attempt to state it in the introductory part of the bill as is done in regard to the allegation of citizenship.

### § 357. General Averment Sufficient.

A general averment that the matter or amount in dispute exceeds two thousand dollars is a sufficient averment. It is not necessary to specify the exact value or amount in controversy, or to state any particular sum.<sup>13</sup>

### § 358. Mere Inference Will Not Support Jurisdiction.

Inferences cannot be resorted to for the purpose of supporting jurisdiction as to the amount in controversy. It must appear affirmatively and positively. Thus it has been held that where the validity of taxes for several years is in controversy and the alleged assessment for one year is below the requisite amount, the court, in order to support its jurisdiction, will not assume that the assessment for the other years was for the same amount.<sup>14</sup>

### § 359. Jurisdiction Determined by Value at Time Suit Brought.

The averment of the value or amount in controversy must speak as of the date of the institution of the lawsuit, and not to the value of the property at some other period. The jurisdiction of the court is

County (1877) Fed. Cas. No. 3,469; jurisdictional amount, *cadit quaestio*, *ju-*  
Muns v. De Nemours (1810) Fed. Cas. jurisdiction fails, for no judgment could  
No. 9,931; Martin v. Taylor (1803) Fed. be given in excess of the amount laid in  
Cas. No. 9,166; Postmaster General v. the writ. Healy v. Prevost (1879) Fed.  
Cross (1822) Fed. Cas. No. 11,306; King Cas. No. 6,297.

v. Wilson (1871) Fed. Cas. No. 7,810; <sup>12</sup> Blackburn v. Portland Gold-Min.  
Berthold v. Hoskins (1889) 38 Fed. 772. Co. (1900) 20 Sup. Ct. 222, 175 U. S.

<sup>13</sup> McLean, J. in Udall v. Steamship 571, 44 L. ed. 276.

Ohio (1864) 17 How. 18, 15 L. ed. 42. <sup>14</sup> Citizens' Bank of Louisiana v. Can-  
If the plaintiff in an action at law non (1896) 17 Sup. Ct. 89, 164 U. S.  
claims less in his declaration than the 319, 41 L. ed. 451.

determined by the facts existing at the time of the beginning of the litigation.<sup>15</sup>

Where jurisdiction has once properly attached, and the case presented by the record is such that a judgment could be rendered for a sum in excess of the jurisdictional amount, jurisdiction will not be defeated by the fact that the recovery is for a less sum than two thousand dollars.<sup>16</sup>

### § 360. Conclusiveness of Plaintiff's Averment as to Amount.

Where the plaintiff's statement of his cause contains a sufficient averment as to the jurisdictional amount, the question naturally arises as to whether that assertion or claim alone is conclusive on the point of jurisdiction. As a matter of literal technicality it would appear to be so. It is of the very essence of the idea of being in dispute that one party should make a claim and that the other should controvert it. Hence it would seem that if a plaintiff seeks to recover a sum greater than two thousand dollars or seeks to recover property or vindicate a right alleged to be of greater value than two thousand dollars, the mere fact that the defendant denies liability as to the whole or as to a part of that claim, or that he denies that the thing sued for has a value of two thousand dollars, would not defeat the jurisdiction of the court. The defendant may, and usually does, controvert the claim and deny liability; but the mere fact that he succeeds in reducing the claim below the jurisdictional amount does not deprive the court of jurisdiction to award judgment for that which is actually found to be due.

If the notion just developed were fully carried out, it is easy to see how the statute could be rendered ineffective and that the jurisdiction of the circuit court could thus be easily extended over claims that really involve very small amounts. All that would be necessary, in order to bring any case within the jurisdiction of the court, would be for the plaintiff to assert that the value in dispute is above the jurisdictional amount. The jurisdictional averment would thus become a nontraversable and fictitious averment. If there had been any remedial necessity for this extension of jurisdiction, legal develop-

<sup>15</sup> *Straaburger v. Beecher* (1890) 44 Fed. Cas. No. 9,931; *Murphy v. Lewis* (1822) Fed. Cas. No. 9,949a.

<sup>16</sup> *Scott v. Donald* (1897) 165 U. S. 58, 41 L. ed. 632; *Day v. Woodworth* (1851) 13 How. 363, 14 L. ed. 181; *Victor Sewing-Mach. Co. v. Mingus* (1878) Fed. Cas. No. 16,936; *Hulsecamp v. Teel* (1796) Fed. Cas. No. 6,862; *Muns v. De Nemours* (1810) Fed. Cas. No. 9,931; *Sherman v. Clark* (1842) Fed. Cas. No. 12,763; *Riggs v. Clark* (1896) 71 Fed. 560, 18 C. C. A. 242; *Hardin v. Cass County* (1890) 42 Fed. 652; *Jones v. McCormick Harvesting Mach. Co.* (1897) 53 Fed. 296, 27 C. C. A. 133.

ment might conceivably have taken this very course. It will be remembered that the court of King's Bench in England once acquired jurisdiction over a large class of actions solely by means of a fiction. But there was no reason why the federal courts should thus permit the statute to be defeated; and accordingly some barrier had to be erected to keep plaintiffs from coming into court under the cover of colorable averments as to the amount or value in controversy. Furthermore, by an express provision of statute the courts are now required to dismiss suits whenever it satisfactorily appears that the suit is not properly within the jurisdiction of the court. The difficulty has been to preserve a just equilibrium, so that while, on the one hand, no merely colorable claim shall be entertained, on the other, no litigant really entitled to be heard in the federal court shall be turned away merely because his claim cannot be vindicated to the full extent sought by him.

### § 361. Present State of Law on This Point.

As a result, the law has come to this: The court, in the first place, accepts the statement of the plaintiff's claim as affording, *prima facie*, the proper test of the existence of the jurisdictional fact. The allegations of the bill, declaration, petition, or libel are taken as a *bona fide* statement of the matter and amount in dispute.<sup>17</sup> But this statement is not conclusive, and if it clearly appears from other parts of the record that the matter in dispute is not within the jurisdiction of the court, the suit will be dismissed.<sup>18</sup> A suit will be dismissed if it appears that the plaintiff's claim is colorable and exaggerated and made merely with a view to get into the federal court.<sup>19</sup> What degree

<sup>17</sup> *West v. Woods* (1883) 18 Fed. 665; *& M. Machinery Co.* (1897) 82 Fed. 209. *Hat-Sweat Mfg. Co. v. Porter* (1891) 46 Fed. 757; *Texas, etc. R. Co. v. Kuteiman* 983, 38 C. C. A. 692; *Postmaster General v. Cross* (1822) 4 Wash. C. C. 328. 503; *Insurance Co. of North America v. Svendsen* (1896) 74 Fed. 346; *Holden v. Utah, etc. Co.* (1897) 82 Fed. 209, writ of error dismissed (1899) 97 Fed. 983, 38 C. C. A. 692; *Hayward v. Nordberg Mfg. Co.* (1898) 85 Fed. 4, 29 C. C. A. 438; *Ryan v. Seaboard, etc. R. Co.* (1898) 89 Fed. 397; *Kunkel v. Brown* (1900) 99 Fed. 593, 39 C. C. A. 665; *Von Schroeder v. Brittan* (1899) 93 Fed. 9. <sup>18</sup> *Schacker v. Hartford Ins. Co.* (1876) 93 U. S. 241, 23 L. ed. 862; *Lee v. Watson* (1863) 1 Wall. 337, 17 L. ed. 557; *Cabot v. McMaster* (1894) 61 Fed. 129; *United States Exp. Co. v. Poe* (C. C.; 1894) 61 Fed. 475; *Holden v. Utah* (1896) 19 C. C. A. 206, 72 Fed. 967; *Bank v. Arapahoe v. Bradley* (1896) 19 C. C. A. 206, 72 Fed. 967; *Blanchard* (1878) 97 U. S. 564, 24 L. ed. 1108; *Hilton v. Dickinson* (1883) 106 U. S. 165, 27 L. ed. 888; *Bradstreet Co. v. Higgins* (1884) 112 U. S. 227, 28 L. ed. 715. *Compare* *Pickham v. Wheeler-Bliss Mfg. Co.* (1897) 77 Fed. 663, 23 C. C. A. 391 *affirming judgment* *Wheeler-Bliss Mfg. Co. v. Pickham* (1897) 168 U. S. 706, 18 Sup. Ct. 945, 42 L. ed. 1211.

of enlargement will cause the court to declare a suit colorable and exaggerated depends on the facts of each case.<sup>20</sup>

### § 362. Amount Claimed Must Not Be Colorable.

Jurisdiction of a claim for a money demand is governed by the value of the actual matter in dispute as shown by the whole record, and not by the damages claimed or the prayer for decree.<sup>21</sup> It is the amount of the claim made in good faith that determines jurisdiction.<sup>22</sup> A claim that manifestly cannot be included as an element of the recovery in any event will not be considered in making out the jurisdictional amount.<sup>23</sup> Proof by the defendant of a partial payment that reduces the amount due below the sum of two thousand dollars does not destroy jurisdiction where it appears that the establishment of such part payment depends on disputed facts or on controverted questions of law.<sup>24</sup>

### § 363. Interest—Matured Coupons on Bonds.

Interest and costs cannot be taken into account in order to raise the value in controversy to the jurisdictional amount.<sup>25</sup> Matured coupons on coupon-bearing bonds are not considered as interest within this rule. They are written contracts for the payment of money, and suit can be maintained on them when separated from the bonds

*Simon v. House* (1891) 46 Fed. 317; *Herbert* (1893) 55 Fed. 443, 5 C. C. A. Horst v. Merkley (1894) 59 Fed. 502; 183; *Ung Lung Chung v. Holmes* (1899) American Wringer Co. v. City of Ionia 98 Fed. 323.

(1896) 78 Fed. 8.

<sup>20</sup> *Hayward v. Nordberg Mfg. Co.*

(1898) 29 C. C. A. 438, 85 Fed. 4.

<sup>21</sup> *Tintzman v. National Bank* (1879)

100 U. S. 8, 25 L. ed. 530; *Banking As-*

*sociation v. Insurance Association* (1880)

102 U. S. 121, 26 L. ed. 45; *Bowman v.*

*Chicago etc. Ry. Co.* (1885) 116 U. S.

601, 29 L. ed. 502; *Hilton v. Dickinson*

(1883) 108 U. S. 165, 174, 27 L. ed. 688,

601; *The Jesse Williamson, Jr.* (1883)

108 U. S. 305, 309, 27 L. ed. 730, 731;

*Jenness v. Citizens' National Bank of*

*Rome* (1884) 110 U. S. 52, 28 L. ed. 67;

*Webster v. Buffalo Insurance Co.* (1884)

110 U. S. 386, 388, 28 L. ed. 172, 173;

*Bradstreet Co. v. Higgins* (1884) 112

U. S. 227, 28 L. ed. 715.

<sup>22</sup> *Bowman v. Railway Co.* (1885) 115

U. S. 611, 29 L. ed. 502; *Peeler v. La-*

*throp* (1891) 1 C. C. A. 93, 48 Fed. 780;

*Maxwell v. Atchison, etc. R. Co.* (1888)

34 Fed. 286; *Herbert v. Rainey* (1892)

54 Fed. 248, decree affirmed *Rainey v.*

*Eq. Prac.* Vol. I.—14.

<sup>23</sup> *Wilson v. Daniel* (1798) 3 Dall.

401, 407, 1 L. ed. 655, 657; *Hilton v.*

*Dickinson* (1883) 108 U. S. 165, 2 Sup.

Ct. 424, 27 L. ed. 688; *Bowman v. Rail-*

*way Co.* (1885) 115 U. S. 611, 6 Sup.

Ct. 192, 29 L. ed. 502; *Barry v. Ed-*

*munda* (1886) 116 U. S. 550, 6 Sup. Ct.

601, 29 L. ed. 729; *Vance v. W. A. Van-*

*dercook Co.* (1898) 170 U. S. 468, 18

Sup. Ct. 845, 42 L. ed. 1111; *Trading Co.*

*v. Morrison* (1900) 178 U. S. 262, 20

Sup. Ct. 869, 44 L. ed. 1061; *Bank*

*Jenness v. Citizens' National Bank of*

*of Arapahoe v. David Bradley & Co.*

(1896) 19 C. C. A. 206, 72 Fed. 367;

*Less v. English* (1898) 85 Fed. 471, 29

C. C. A. 275; *Battle v. Atkinson* (1902)

115 Fed. 384.

<sup>24</sup> *Lozano v. Wehmer* (1885) 22 Fed.

755; *Stillwell-Bierce & Smith-Valle Co.*

*v. Williamstown Oil & Fertilizer Co. (C.*

*C.)* 1897) 80 Fed. 68.

<sup>25</sup> *Baker v. Howell* (1890) 44 Fed.



on which they accrued. Hence, in a suit on bonds, the amount of the coupons can be added to the amount of the bonds to bring the sum in controversy up to the jurisdictional amount.<sup>26</sup>

The reasonable attorney's fee sometimes stipulated for in contracts is a part of the contractual liability and may properly be estimated in considering the jurisdictional amount.<sup>27</sup>

### § 364. Determination of Issue as to Value in Controversy.

The issue on the question whether the amount in controversy is sufficient to give jurisdiction is distinct from the question of the merits and should be determined as a distinct issue.<sup>28</sup> Where the answer raises an issue by controverting the jurisdiction, there should be a finding on that point one way or the other, and if the proof fails to show jurisdiction, the suit must be dismissed.<sup>29</sup> But the court will retain the cause until the defendant makes it affirmatively appear by proof that the amount in controversy is below the jurisdictional limit. When this fact does appear the court will of its own motion dismiss the suit.<sup>30</sup>

### § 365. Certainty Necessary to Exclude Jurisdiction.

Before a suit containing proper jurisdictional averments will be dismissed for lack of jurisdiction on the facts shown by the whole record, those facts must create a legal certainty against the jurisdiction; <sup>31</sup> and every reasonable intendment will be made in favor of the jurisdiction, especially where a plea is not separately put in on the question of jurisdiction.<sup>32</sup>

1. *Pine v. Mayor* (1900) 103 Fed. 337: Bill to enjoin an unlawful diversion of water. There was an allegation that the damage to each plaintiff by reason of the wrong complained of was, or would be, about two thousand four hundred

<sup>26</sup> *Edwards v. Bates County* (1896) (1901) 181 U. S. 409, 431, 45 L. ed. 927, 163 U. S. 269, 41 L. ed. 155, reversing 937.

*Standard Sugar Refinery v. Castano* (1890) 43 Fed. 279.

<sup>27</sup> *Rogers v. Riley* (1896) 80 Fed. 759.

<sup>28</sup> *Mexican Cent. R. Co. v. Glover* (1901) 48 C. C. A. 334, 107 Fed. 356.

<sup>29</sup> *Greene v. Tacoma* (1892) 53 Fed. 562.

<sup>30</sup> *Pennsylvania Co. v. Bay* (1905) 138 Fed. 203.

<sup>31</sup> *Barry v. Edmunds* (1886) 116 U. S. 550, 29 L. ed. 729; *Wetmore v. Rymer* (1898) 169 U. S. 115, 42 L. ed. 682; *Put-in-Bay Waterworks Co. v. Ryan*

<sup>32</sup> *Waterfield v. Rice* (1901) 49 C. C. A. 504, 111 Fed. 625. Where a bill seeks to recover installments of an annuity which represent a sum greater than the jurisdictional amount, the fact that some of those installments appear on the face of the bill to be barred by the statute of limitations, will not deprive the court of jurisdiction. The recovery in such a case would cover all the installments if the plaintiff does not put in the defense of the statute. Compare *Schunk v. Moline, etc. Co.* (1892) 147 U. S. 504, 37 L. ed. 258.

dollars. The answer admitted the diversion but insisted that it would cause little or no damage. The court found that there would be considerable damage but did not undertake to estimate its exact amount, or to ascertain whether it would come to as much as two thousand dollars. It was said that, in the absence of a plea to the jurisdiction, the allegation in the bill that the damage exceeded two thousand dollars gave jurisdiction, and that this jurisdiction would not be defeated though the answer denied that the damage was of the jurisdictional amount and the proof on this point corroborated the answer.

2. *Butchers' etc. Co. v. Louisville etc. R. Co.* (1895) 14 C. C. A. 290, 67 Fed. 35: Bill against a railroad by a stockyards' company to compel the building of a spur track. The plaintiff in substance alleged that the value of the plaintiff's right to have the siding built and to have live stock received and delivered at its yards was in excess of two thousand dollars. The answer denied this. On the question of jurisdiction, the circuit court of appeals speaking through Taft, Circuit Judge, said: "We think a liberal construction of the bill must be given to sustain the jurisdiction of the court at this time, in view of the fact that no plea to the jurisdiction was made below, and no question of the jurisdiction seems there to have been raised."

3. *Maffet v. Quine* (1899) 95 Fed. 199, (1899) 93 Fed. 347: Bill to enjoin interference with a flume built to convey lumber and to enjoin interference with water and water rights necessary to the use of the flume. The bill alleged the value of the flume and rights in controversy to be largely in excess of the necessary amount. The answer admitted some value, but it was insisted for the defendant that the evidence failed to sustain the allegations of the bill as to the amount in controversy. It was held that in order to defeat jurisdiction, the facts must create a legal certainty that the value in controversy was below two thousand dollars.<sup>33</sup>

In suits to enforce political rights unusual liberality of practice prevails as regards the requirement of the stating of the jurisdictional amount;<sup>34</sup> and in such a suit the question will not be permitted to be raised for the first time in the supreme court.<sup>35</sup>

### § 366. Proof of Value Where No Money Demand—Use of Affidavits.

Where the demand is not for money and the nature of the suit does not require the value of the thing demanded to be stated in the bill or declaration, the jurisdictional value may be shown by proof in the usual course, or by affidavits.<sup>36</sup>

<sup>33</sup> *Wetmore v. Rymer* (1896) 169 U. S. 115, 42 L. ed. 682. *Es p. Bradstreet* (1833) 7 Pet. 634, 8 L. ed. 810: Writ for recovery of land.

<sup>34</sup> *Wiley v. Sinkler* (1900) 179 U. S. 58, 45 L. ed. 84; *Swafford v. Templeton* (1902) 185 U. S. 487, 40 L. ed. 1005. Neither the writ nor declaration contained any jurisdictional statement of value. It was held that the value might be given in evidence. Said Marshall, C. J.: "In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the dec-

<sup>35</sup> *Giles v. Harris* (1903) 189 U. S. 475, 47 L. ed. 909.

<sup>36</sup> *Crawford v. Burnham* (1871) Fed. Cas. No. 3,366. See *Fuller v. Montague* (1893) 8 C. C. A. 100, 59 Fed. 212.

1. *Gage v. Pumpelly* (1883) 108 U. S. 164, 27 L. ed. 668: Bill in equity to set aside a tax sale of real property. Numerous affidavits of value were taken. On motion to dismiss in the supreme court, it was held that while the record showed that probably the estimates of the value of the property which brought it up to the jurisdictional amount were somewhat too high, yet there was no such preponderance of evidence against jurisdiction as would justify the dismissal of the suit.

2. *Wilson v. Blair* (1886) 119 U. S. 387, 30 L. ed. 441: Suit to recover real estate. Judgment for plaintiff and motion to dismiss for want of jurisdiction. There being nothing in the record to show value, leave was given to file affidavits and counter affidavits of value. The affidavits were contradictory. On appeal the supreme court dismissed the suit because the greater weight of testimony, on the showing of the affidavits, was to the effect that the property was not worth the jurisdictional amount. In commenting on the practice of showing value by affidavits in such cases, the supreme court said: "This was good practice and if oftener adopted would save trouble to parties and to us."

3. *Sharon v. Terry* (1888) 1 L.R.A. 572, 36 Fed. 337: Bill in equity to cancel an instrument purporting to be a written contract of marriage. It was alleged that the instrument was a forgery. If valid, it would have given the defendant rights in the property of the plaintiff and would have imposed obligations on him. The bill contained no statement that the value of plaintiff's property was such that the rights jeopardized by the alleged contract were of greater value than the jurisdictional amount. The fact was permitted to be shown by affidavits. Said Field, Circuit Justice: "It is well settled that where the controversy is not respecting the amount or value of the matter in dispute, such amount or value, when necessary to the jurisdiction, may be shown by the evidence produced in the case, or by affidavits filed in behalf of the parties. . . . The practice of admitting such evidence as to the value of the matter in dispute, in order to give the supreme court of the United States jurisdiction to review the judgments of inferior tribunals, where such value does not appear upon the records, is followed at every term."

### *Aggregation of Claims.*

#### **§ 367. Aggregation of Separate Claims Held by One Plaintiff.**

The practice of joining in one bill different claims held by one or more plaintiffs against one or more defendants has given rise to much discussion in regard to the application of the rule requiring the amount in controversy to be greater than two thousand dollars. The question is, when can several different claims, each for a less sum than the jurisdictional amount, be aggregated so as to give the court jurisdiction of all the claims together? The class of cases most

laration, the practice of this court, and order of the judge of the district court of the courts of the United States, is, had a right to give the value of the to allow the value to be given in evidence. In pursuance of this practice, property demanded in evidence, at or before the trial of the cause," the demandant in the suits dismissed by

favorable to the right thus to aggregate different claims is that in which there is only one plaintiff and one defendant. The rule on this point is that the jurisdictional amount may be made up by joining in one suit different claims and accounts of the same plaintiff against the same defendant, provided they are of such nature that they may, on general principles of pleading and practice, be properly joined.<sup>37</sup>

Illustration of this is found in suits brought by assignees to recover from the obligor on different choses in action obtained by assignment from different persons. Here the rule is that the assignee whose claims aggregate more than two thousand dollars may join them in one suit (if at the time of the several assignments all of the assignors lived in different states from that of the defendant); and it makes no difference that those assignors could not sue owing to the smallness of their several claims.<sup>38</sup> But where some of the claims are assigned in bad faith merely to enable the assignee to sue in the federal court, the suit will be dismissed as to such of the claims as are so assigned; and if the remaining claims are not sufficient to give jurisdiction the entire suit will be dismissed.<sup>39</sup>

### § 368. When Claims of Different Plaintiffs May Be Aggregated.

If the different claims or rights are owned by several persons and they seek to enforce all in one joint suit, the rule of practice is less favorable to the right to aggregate all the claims so as to satisfy the jurisdictional requirement. Before the court can have jurisdiction in such a case, it must not only appear that the claims are such as

<sup>37</sup> *Armstrong v. Ettlesohn* (1888) 36 (1872) 2 Dill. (U. S.) 213, Fed. Cas. Fed. 209; *American Fertilizing Co. v. No. 7,568.*  
*Board of Agriculture* (1890) 11 L.R.A. <sup>38</sup> *Stanley v. Board* (1883) 16 Fed. 179, 43 Fed. 609; *Hartford F. Ins. Co.* 483; *Hammond v. Cleaveland* (1885) 23 Fed. 1; *Bernheim v. Birnbaum* (1887) 151, 11 L.R.A. 623, decree modified 30 Fed. 885; *Chase v. Roller-Mills Co.* (1893) 56 Fed. 378, 5 C. C. A. 524; (1893) 8 C. C. A. 248, 56 Fed. 625; *Gulf, etc. R. Co. v. Washington* (1892) 49 Fed. 347, 1 C. C. A. 236; *Telegraph Co. v. Poe* (1894) 61 Fed. 469; *Sandford v. Poe* (1895) 60 L.R.A. 641, 16 C. C. A. 305, 69 Fed. 546; *Fitchett v. Blows* (1896) 74 Fed. 47, 20 C. C. A. 226; *Western Union Tel. Co. v. Norman* (1896) 77 Fed. 13; *Weaver v. Norway Tack Co.* (C. C.; 1896) 80 Fed. 700; *Tennent-Stribling Shoe Co. v. Roper* (1899) 94 Fed. 739, 36 C. C. A. 455; *Thompson v. Southern R. Co.* (1902) 116 Fed. 890; *Judson v. Macon County* 956.  
<sup>39</sup> *Williams v. Nottawa* (1881) 104 U. S. 209, 26 L. ed. 719; *Bernards v. Stebbins* (1883) 109 U. S. 341, 27 L. ed. 956.

may be properly joined in one suit conformably with the recognized principles of practice, but it must also appear that the several parties have a common and undivided interest in the fund which makes up the joint claim, or a common interest in the right which is the subject of the controversy. In equity and in admiralty when the sum sued for is one in which the plaintiffs have a joint and common interest and the defendant has nothing to do with its distribution among them, the whole sum sued for is the test of the jurisdiction.<sup>40</sup> Among the following illustrations are found cases in which it has been held proper to aggregate the claims of the several plaintiffs in order to make out the jurisdictional amount and others in which this has not been permitted.

1. *Oley v. Field* (1891) 138 U. S. 464, 34 L. ed. 1044: Mr. Justice Bradley here stated the principle governing the right to aggregate different claims in order to make out the jurisdictional amount in the following terms: "The general principle . . . is, that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated."

2. *Shields v. Thomas* (1854) 17 How. 3, 15 L. ed. 93: Several distributees of the estate of a deceased person joined in a bill for an accounting of property of the deceased which had come into the defendant's hands and had been converted by him. The value of this property was more than the jurisdictional amount, but the interest of each distributee was less than the jurisdictional amount. It was held that the bill could be maintained. Said the court: "The court think the matter in controversy, in the Kentucky court, was the sum due to the representatives of the deceased collectively; and not the particular sum to which each was entitled, when the amount due was distributed among them, according to the laws of the state. They all claimed under one and the same title. They had a common and undivided interest in the claim; and it was perfectly immaterial to the appellant, how it was shared among them. He had no controversy with either of them on that point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him."<sup>41</sup>

3. *Washington Market Co. v. Hoffman* (1879) 101 U. S. 112, 25 L. ed. 782: Two hundred and six plaintiffs, occupants of market stalls, sued for an injunc-

<sup>40</sup> *Washington Market Co. v. Hoffman* (1884) 112 U. S. 36, 28 L. ed. 627; *Estes* (1879) 101 U. S. 112, 25 L. ed. 782; *The v. Gunter* (1887) 121 U. S. 183, 28 L. ed. 884; *Connemara* (1890) 103 U. S. 754, 26 L. ed. 884. <sup>41</sup> See *Prince v. Towns* (1887) 33 Fed. 773, 26 L. ed. 957; *Davies v. Corbin* 161.

tion to restrain the market company from selling the stalls by auction. The decree was a single one in favor of all of them and in denial of the right claimed by the defendant company. The value of the interest of each stall keeper was less than the jurisdictional amount, but the interest of the company was much greater. It was held that the court properly had jurisdiction.

4. *Wholesale v. St. Louis* (1901) 180 U. S. 379, 45 L. ed. 533, *affirming* (1899) 96 Fed. 865: Bill to enjoin a city from imposing the costs of improvements on the property of adjacent owners. The various lots of land threatened with assessment were owned in severalty and the bill was filed jointly by a number of the owners. No one plaintiff was interested in the lot of any other plaintiff. The assessment against no lot amounted to two thousand dollars. It was held that the suit should be dismissed, as the several claims and interests of the plaintiffs could not be properly aggregated.<sup>43</sup>

5. *Hegge v. Kansas City, etc., R. Co.* (1900) 104 Fed. 391: Several land-owners, who claimed to be injured by a nuisance created by an overflow of their lands, filed a bill jointly to enjoin the nuisance. Each party was alleged to be damaged to a greater extent than two thousand dollars. It was held that the court had jurisdiction. The bill in such case would have to be dismissed as to any plaintiff whose damages would appear to be less than that amount.

6. *Walter v. Northeastern R. Co.* (1892) 147 U. S. 370, 37 L. ed. 206: Bill by a railroad company to enjoin the collection of taxes on property of the railroad lying in different counties. Part of the taxes were admitted to be good, but the validity of the other taxes was questioned. This excess was composed of taxes going separately to the county authorities, and the sum claimed in each county was less than the jurisdictional amount, but the aggregate was larger than that amount. If the taxes had been paid and suits brought to recover the same it would have been necessary to sue separately in each county. It was held that the claims could not be aggregated.<sup>44</sup>

7. *Citizens' Bank v. Cannon* (1894) 164 U. S. 319, 41 L. ed. 451: The bill alleged that the defendants were about to assess and collect state and parish taxes for five successive years. There was no specific allegation as to the amount of the assessment or taxes for any one parish, but there was a general averment that the aggregate amount of taxes for the several parishes exceeded two thousand dollars. It was held that the separate taxes for the different counties could not be thus aggregated. But the taxes for several successive years could be so aggregated, if properly pleaded.

8. *Stratton v. Jarvis* (1834) 8 Pet. 4, 8 L. ed. 846: A libel for salvage was filed against several packages of merchandise, and a decree was rendered against each consignment for an amount not sufficient in itself to authorize an appeal by any one claimant. It was held that the appeal of each claimant must be treated as a separate one and that they could not be aggregated for the purpose of giving the appellate court jurisdiction.<sup>45</sup>

<sup>43</sup> *Russell v. Stannell* (1881) 105 U. S. 309, 26 L. ed. 989; *Chatfield v. Boyle* (1893) 148 U. S. 391, 37 L. ed. 404; (1891) 105 U. S. 231, 26 L. ed. 944; *Sioux Falls Nat. Bank v. Swenson* (1892) 106 U. S. 108, 27 L. ed. 99; *Ogden City v. Armstrong* (1897) 166 U. S. 224, 42 L. ed. 444.

<sup>44</sup> See *Northern Pac. R. Co. v. Walker* (1893) 148 U. S. 391, 37 L. ed. 404; *Sioux Falls Nat. Bank v. Swenson* (1892) 106 U. S. 108, 27 L. ed. 99.

<sup>45</sup> *Spear v. Place* (1850) 11 How. 522, 13 L. ed. 798.

### § 369. Aggregation of Claims in Creditors' Suit.

In the true creditors' bill, filed against an insolvent corporation or an insolvent estate to have its assets administered as a trust fund and ratably applied to the claims of all creditors, different individuals may unite their claims and thus bring the suit within the jurisdictional limit; for they sue in a sort of joint right.<sup>45</sup>

*Handley v. Stuts* (1890) 137 U. S. 366, 34 L. ed. 706: A creditors' bill was filed against an insolvent corporation for the purpose of enforcing the liability of the stockholders as to unpaid subscriptions. The plaintiffs held judgment claims to the extent of more than two thousand dollars. It was held that the court had jurisdiction and that creditors in like position with smaller claims could come in and share in the distribution of assets.

### § 370. Common Suit by Several Creditors.

But in the ordinary suit brought by several creditors suing in their own right to defeat a fraudulent conveyance made by the common debtor, the rule is different. Here jurisdiction as to each plaintiff creditor must depend on the amount of his own claim.<sup>46</sup>

1. *Stewart v. Dunham* (1885) 115 U. S. 61, 29 L. ed. 329: A bill was filed jointly by creditors at large to reach property of a common debtor alleged to have been fraudulently transferred. It was held that as to creditors whose several claims did not reach the jurisdictional amount, the suit must be dismissed.<sup>47</sup>

2. *Reaver v. Bigelow* (1886) 5 Wall. 206, 18 L. ed. 595: A bill in equity was filed by two creditors, by judgments for less than a thousand dollars each, against their debtor and a person alleged to have fraudulently obtained possession of a fund of more than two thousand dollars value. It was sought to compel satisfaction of the debts out of that fund. The case was dismissed for want of jurisdiction. Said the court: "The judgment creditors who have joined in this bill have separate and distinct interests, depending upon separate and distinct judgments."<sup>48</sup>

Two other cases were disposed of at the same time and on a similar principle. In one, the whole amount of the debts sued for was more, although each debt was less, than two thousand dollars. Mr. Justice Nelson said: "No one of the three separate and distinct classes of creditors held a judgment exceeding two thousand dollars. Neither judgment creditor therefore is entitled to an

<sup>45</sup> *Johnson v. Waters* (1883) 111 U. S. (1891) 138 U. S. 464, 479, 34 L. ed. S. 640, 674, 28 L. ed. 547, 559. 1044, 1049; *Auer v. Lombard* (1896) 19

<sup>46</sup> *Walter v. Northeastern R. Co.* C. C. A. 72, 72 Fed. 209.

(1892) 147 U. S. 373, 37 L. ed. 208; <sup>48</sup> *Schwed v. Smith* (1882) 106 U. S. Putney v. Whitmire (1895) 66 Fed. 385; 188, 27 L. ed. 156; *Farmers' Loan, etc. Smithson v. Hubbell* (1897) 81 Fed. 593. *Co. v. Waterman* (1882) 106 U. S. 265.

<sup>47</sup> See *Gibson v. Shufeldt* (1897) 122 27 L. ed. 115; *Hassall v. Wilcox* (1885) U. S. 27, 39 L. ed. 1083; *Clay v. Field* 115 U. S. 598, 29 L. ed. 504.

appeal to this court." In the other case, some of the creditors had claims for more than the jurisdictional amount and the appeal was sustained as to them, but dismissed as to others.<sup>49</sup>

### § 371. Federal Practice Unaffected by State Law.

On the question of the right to aggregate the claims of the same or different plaintiffs, in order to make up the jurisdictional amount, the federal courts follow their own rules of practice, and are not bound by state practice even though the latter is based on local enactments. The reason for this attitude of the federal courts is that this question of practice really involves a point of jurisdiction; and the jurisdiction of the federal courts is in no manner affected by state statutes.<sup>50</sup>

#### *Objection for Insufficiency of Jurisdictional Averment.*

### § 372. Demurrer for Absence of Jurisdictional Averment.

Having considered the mode in which the jurisdictional fact should be made to appear, we proceed to discuss more particularly the question as to the time and manner in which the truth of the jurisdictional allegation may be inquired into and judicially tested, and more especially with regard to the effect of the statutory enactments bearing on this matter. It is obvious at the outset that in all cases where the jurisdictional averment is necessary to be made in the plaintiff's statement of his cause, a demurrer will lie for a failure to make that statement.<sup>51</sup>

### § 373. Plea Raising Issue on Truth of Averment.

Furthermore, where the jurisdictional averment is properly made in the plaintiff's pleadings, it is plain that the normal way in which to test the truth of that allegation is by plea in abatement.<sup>52</sup>

### § 374. Burden of Proof on Issue Made by Plea.

On the issue raised by the plea in abatement, the burden of proof is on the party raising the objection. Such is the general principle of

<sup>49</sup> See *Field v. Bigelow* (1867) 18 L. ed. 604; *Seaver v. Bigelow* (1866) 5 Wall. 208, 18 L. ed. 595.

<sup>50</sup> *Holt v. Bergevin* (1894) 60 Fed. 1; *Busey v. Smith* (1895) 67 Fed. 13.

<sup>51</sup> *Battle v. Atkinson* (1902) 115 Fed. 385.

<sup>52</sup> *Cooper v. Preston* (1900) 105 Fed. 403.

Equity rule 39 recognizes the principle that questions in abatement, as whether a party does have the requisite citizenship to give jurisdiction, must be raised by plea.



pleading. It has been expressed by the supreme court as follows: Wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken *prima facie* as existing; and it is incumbent on him who would impeach that jurisdiction for causes *dehors* the pleading, to allege and prove such causes: the necessity for the allegation and the burden of sustaining it by proof both rest upon the party taking the exception.<sup>53</sup>

By a plea or answer to the merits a defendant necessarily admits the plaintiff's capacity to sue; <sup>54</sup> and hence after a plea or answer to the merits, defendant will not be heard to say that the evidence does not support the allegations of the declaration or bill in regard to such a question as citizenship, since the question of citizenship constitutes no part of the merits of the case.<sup>55</sup>

#### § 375. Jurisdiction Admitted by Answer to Merits.

The rule in equity is the same as at law. The question of the want of jurisdiction must be raised by demurrer or plea and cannot be raised by the answer.<sup>56</sup> A motion to dismiss for want of proper citizenship will not be entertained at the trial after the defendant has pleaded the general issue or put in other special pleas to the merits.<sup>57</sup>

#### § 376. Effect of Modern Statute.

Nothing could be simpler than the application of the foregoing rules to the solution of the problems that arise in regard to the pleading of jurisdictional facts. Such at least was the state of the law as it existed prior to 1875. By section five of the act of the third of

<sup>53</sup> Sheppard v. Graves (1852) 14 How. 505, 510, 14 L. ed. 518, 520.

<sup>54</sup> Sheppard v. Graves (1852) 14 How. 505, 510, 512, 14 L. ed. 518, 520, 521; D'Wolf v. Rabaud (1828) 1 Pet. 476, 7 L. ed. 227; Conard v. Atlantic Ins. Co. (1828) 1 Pet. 386, 450, 7 L. ed. 189, 217; Evans v. Gee (1837) 11 Pet. 80, 83, 9 L. ed. 639, 640; Smith v. Kernochen (1849) 7 How. 198, 12 L. ed. 666. In Jones v. League (1855) 18 How. 76, 81, 15 L. ed. 263, 264, Mr. Justice McLean observed: "At an early period of this court, it was held in some of the circuit courts, that the averment of citizenship, to give jurisdiction, must be proved on the general issue. And as a consequence of this view, if at any stage of the cause it appeared that the plaintiff's averment of citizenship was not true, he

failed in his suit. But it is now held, and has been held for many years, that if the defendant disputes the allegation of citizenship in the declaration, he must plead the fact in abatement of the suit; and that this must be done in the order of pleading, as at common law."

<sup>55</sup> Sims v. Hundley (1848) 6 How. 1, 5, 12 L. ed. 319, 320; D'Wolf v. Rabaud (1828) 1 Pet. 476, 498, 7 L. ed. 227, 236; Smith v. Kernochen (1849) 7 How. 198, 12 L. ed. 666.

<sup>56</sup> Livingston v. Story (1837) 11 Pet. 351, 9 L. ed. 746; De Sobry v. Nicholson (1865) 3 Wall. 423, 18 L. ed. 264; Marshall v. Otto (1893) 59 Fed. 249; Goodyear v. Blake (1899) Fed. Cas. No. 5,500.

<sup>57</sup> DeSobry v. Nicholson (1865) 3 Wall. 420, 18 L. ed. 263.

March of that year the entire subject was upset. As a consequence it becomes necessary to consider the law of the subject anew and in the light of that statute. By section five of this enactment it was provided that whenever, in any suit commenced in the circuit court or removed thereto from a state court, it shall appear to the satisfaction of said circuit court that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court, or that parties have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable by the court or removable thereto, the said circuit court shall proceed no further therein but shall dismiss the suit or remand it to the court from which it was removed.<sup>58</sup> This statute, it will be seen, imposes a positive duty on the court, in the contingency mentioned, to dismiss or remand the suit; and this duty is to be fulfilled regardless of the question as to how the objection is raised by the parties or whether it is raised by them at all. The court must take the initiative and dismiss or remand the cause whenever it transpires that the suit is subject to the defect.

**§ 377. Purpose and Occasion of Act of March 3, 1875.**

The reason for the enactment of this statute and the evil it was intended to guard against are perfectly well understood as a matter of history and should be here stated because of the light which is thereby shed on the legislative intent. The provision in question was inserted in the Judiciary Act of 1875 in order to prevent frauds on the jurisdiction of the federal court which arose, or were thought likely to arise, from colorable transfers of rights of action and the collusive joinder of parties plaintiff or defendant. The reason why the necessity or supposed necessity for such a provision was felt at this time is found in the fact that, by another part of this act, the federal courts were opened more widely than before to suits brought by transferees or assignees of choses in action. Thus it appears that by the act of September 24, 1789, c. 20, sec. 11, the circuit court had no power to entertain a suit brought by the transferee of a promissory note unless a suit might have been prosecuted in such court by the original holder if no assignment had been made. By the act of March 3, 1874, c. 137, sec. 1, this particular qualification of the right of the transferee of promissory notes was removed; and consequently

<sup>58</sup> 18 Stat. L. 472.

any holder of a promissory note, having the proper citizenship, could thereafter sue in the federal courts. Under the previous act the jurisdiction of the federal courts in suits by assignees of choses in action was confined within comparatively narrow limits, and there was little danger of collusion to create a case cognizable in those courts. But as the jurisdiction of the court was now extended, there arose the probability that collusive transfers would be made merely to get the promissory note on which it was desired to bring suit into the hands or nominal ownership of a person having citizenship diverse from the citizenship of the defendant. There were other extensions of the jurisdiction of the circuit court affected by the act in question, but these need not be noticed in the present connection.

Now in order to protect the court as well as the adversary party from all attempts fraudulently and collusively to bring controversies within the jurisdiction of the court, it was thought well to insert, in the act of 1875, that section which requires the court to dismiss or remand any suit when it satisfactorily appears that the suit is not one properly within the jurisdiction of the court. Such was the purpose and intent of the act, and yet it will be noted that the enactment in question is broad in its terms and extends not only to cases of collusive transfer and collusive joinder but to every case where it transpires that the suit is not one properly within the jurisdiction of the court. The statute is evidently broader than the particular evil aimed at. No distinction is drawn in the statute between those suits in which parties have been collusively made or joined and those that do not really and substantially involve a controversy properly within the jurisdiction of the court. Furthermore it is to be noted that the act of March 3, 1875, in so far as it gives transferees of promissory notes the right to sue in the federal court has been subsequently qualified,<sup>59</sup> so that the law in regard to suits by these parties is restored to precisely the same state as it was in prior to the act of 1875. Nevertheless, the section referring to the duty of the court to dismiss or remand when it appears that a suit is not properly within the jurisdiction of the court has been retained and is still the law,—a circumstance that affords additional proof that the section in question cannot be limited to the cases within the evil against which it was primarily intended to legislate. We now proceed to consider some of the more important cases in which section five of the act of 1875, as re-enacted and continued in subsequent statutes, has been applied.

<sup>59</sup> Act of March 3, 1887, c. 373, sec. 1 (as corrected by Act of Aug. 13, 1888, c. 866, sec. 1.)

## § 378. Application of Statute—Collusive Parties.

It is the duty of the court in all cases in the purview of the statute to dismiss the cause wherever and whenever the defect of jurisdiction is made to appear, and it makes no difference whether the point is raised by demurrer, plea, answer, or by motion to dismiss. Indeed the court will take this action of its own motion if the situation seems to warrant such course. In point of principle it is immaterial whether the defect of jurisdiction is concerned with the nature of the cause of action, the citizenship of the parties, or the amount in controversy.<sup>60</sup> But the question most commonly arises in connection with the question of citizenship and, more particularly, in connection with the assignment or transfer of property or rights of action.<sup>61</sup>

1. *Williams v. Nottawa* (1881) 104 U. S. 209, 26 L. ed. 719: Suit was brought in Michigan by a citizen of Indiana on certain municipal bonds issued by a township in Michigan. It appeared in the evidence that the bonds had been assigned to the plaintiff by citizens of Michigan, the only purpose of the transfer being that suit might be brought on the bonds in the federal court. The beneficial interest remained in the several assignors. In the supreme court, it was said: "As it was the duty of the circuit court, on its own motion, as soon as the evidence was in and the collusive character of the case shown, to

<sup>60</sup> *Put-in-Bay Waterworks Co. v. Ryan* 1047, 38 L. ed. 1014 (*modifying* *Mercantile Trust Co. v. Texas, etc. R. Co.* (1901) 181 U. S. 409, 45 L. ed. 927; *Simon v. House* (1891) 46 Fed. 319, (1892) 51 Fed. 529); *Lanier v. Nash*, 7 Sup. Ct. 919, 121 U. S. 404, 30 L. ed. 947; *Launing v. Lockett* (1882) 10 Fed. 451; *Van Dolsen v. New York* (1883) 17 Fed. 817; *Cross v. Allen*, 12 Sup. Ct. 67, 141 U. S. 528, 35 L. ed. 843, *affirming* *Allen v. O'Donald* (C. C.; 1886) 28 Fed. 346; *Garrett v. New York Transit & Terminal Co.* (1886) 29 Fed. 129; *Neal v. Foster* (C. C. 1888) 36 Fed. 20; *Crawford v. Neal*, 12 Sup. Ct. 759, 144 U. S. 585, 36 L. ed. 552; *Goff's Adm'r v. Norfolk, etc. R. Co.* (1888) 36 Fed. 299; *Betsoldt v. American Ins. Co.* (1891) 47 Fed. 705; *Towle v. American Bldg., etc. Soc.* (C. C.; 1894) 60 Fed. 131; *Bowdoin College v. Merritt* (C. C.; 1894) 63 Fed. 213; *Irvine Co. v. Bond Guaranty Co. v. Electrical Supply Co.* (1893) 58 Fed. 732, 7 C. C. A. 471; *Lake County Com'rs v. Schradaky* (1899) 97 Fed. 1, 38 C. C. A. 17.

<sup>61</sup> In the following cases it was held that the right to sue was defeated because of the collusive making of one or more parties: *Hayden v. Manning* (1882) 1 Sup. Ct. 617, 106 U. S. 598, 27 L. ed. 306; *Manhattan L. Ins. Co. v. Broughton* (1883) 3 Sup. Ct. 99, 109 U. S. 121, 27 L. ed. 878; *New Providence Tp. v. Halsey* (1886) 6 Sup. Ct. 764, 117 U. S. 336, 29 L. ed. 904 (*reversing* *Halsey v. Township of New Providence* (1880) 3 Fed. 364); *Marvin v. Ellis* (1891) 9 Fed. 367; *Greenwalt v. Tucker* (1892) 10 Fed. 884; *Coffin v. Haggin* (1892) 11 Fed. 219; *Fountain v. Angellica* (1892) 12 Fed. 8; *McLean v. Clark* (1897) 31 Fed. 501; *Industrial, etc. Guaranty Co. v. Electrical Supply Co.* (1893) 58 Fed. 732, 7 C. C. A. 471; *Lake County Com'rs v. Schradaky* (1899) 97 Fed. 1, 38 C. C. A. 17.

In these other cases, it was held that the party as to whose joinder objection was made was not collusively made or joined: *Reagan v. Farmers' Loan, etc. Co.* (1894) 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014 (*modifying* *Mercantile Trust Co. v. Texas, etc. R. Co.* (1901) 181 U. S. 409, 45 L. ed. 927; *Simon v. House* (1891) 46 Fed. 319, (1892) 51 Fed. 529); *Lanier v. Nash*, 7 Sup. Ct. 919, 121 U. S. 404, 30 L. ed. 947; *Launing v. Lockett* (1882) 10 Fed. 451; *Van Dolsen v. New York* (1883) 17 Fed. 817; *Cross v. Allen*, 12 Sup. Ct. 67, 141 U. S. 528, 35 L. ed. 843, *affirming* *Allen v. O'Donald* (C. C.; 1886) 28 Fed. 346; *Garrett v. New York Transit & Terminal Co.* (1886) 29 Fed. 129; *Neal v. Foster* (C. C. 1888) 36 Fed. 20; *Crawford v. Neal*, 12 Sup. Ct. 759, 144 U. S. 585, 36 L. ed. 552; *Goff's Adm'r v. Norfolk, etc. R. Co.* (1888) 36 Fed. 299; *Betsoldt v. American Ins. Co.* (1891) 47 Fed. 705; *Towle v. American Bldg., etc. Soc.* (C. C.; 1894) 60 Fed. 131; *Bowdoin College v. Merritt* (C. C.; 1894) 63 Fed. 213; *Irvine Co. v. Bond Guaranty Co. v. Electrical Supply Co.* (1893) 58 Fed. 732, 7 C. C. A. 471; *Lake County Com'rs v. Schradaky* (1899) 97 Fed. 1, 38 C. C. A. 17.

stop all further proceedings and dismiss the suit, the judgment is reversed, and the cause remanded with instructions to dismiss the suit."<sup>61</sup>

2. *Farmington v. Pillsbury* (1885) 114 U. S. 138, 29 L. ed. 114: This case was very similar to the preceding one. Coupons in a considerable amount were collected from various holders of bonds, all citizens of Maine, and transferred to the plaintiff, a citizen of Massachusetts, under an arrangement by which the plaintiff gave to the agent of the holders of the bonds his non-negotiable promissory note for five hundred dollars payable in two years, and also agreed, as a further consideration for the coupons, to pay to the same agent fifty per cent of their value if he succeeded in collecting them. It was held that the transfer of the coupons was colorable and that the suit was really for the benefit of the owners of the bonds. The suit was accordingly dismissed.

3. *Morris v. Gilmer* (1889) 129 U. S. 315, 32 L. ed. 690: A bill was filed by one whose right to relief in the federal court depended on citizenship in Tennessee. After the answer was filed the defendant procured affidavits tending to show that the plaintiff was really a citizen of Alabama and had merely gone to Tennessee in order to bring the case within federal jurisdiction but without any intention permanently to abide there. Evidence regularly taken tended to confirm this view. Before the hearing a motion was made to dismiss for want of jurisdiction, but the circuit court refused to do so. On appeal to the supreme court, it was held that the evidence sufficiently showed that plaintiff's removal to Tennessee was not a *bona fide* change of citizenship and the suit was dismissed. In speaking of the duty of the circuit court to dismiss, it was said: "It is true that, by the words of the statute, this duty arose only when it appeared to the satisfaction of the court that the suit was not one within its jurisdiction. But if the record discloses a controversy of which the court cannot properly take cognizance, its duty is to proceed no further and to dismiss the suit; and its failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will correct, when the case is brought here for review." Again said the court: "This court [the supreme court] must, upon its own motion, guard against any invasion of the jurisdiction of the circuit court of the United States as defined by law, where the want of jurisdiction appears from the record brought here."<sup>62</sup>

4. *Detroit v. Dean* (1882) 106 U. S. 537, 27 L. ed. 300: A gas company in Detroit had, or was supposed by its officers and stockholders to have, a meritorious cause of action against that city. Owing to local prejudice it was thought that the company would have a better chance in the federal court than in the state court. One of the stockholders, also a director, was a citizen of another state. Accordingly a plan was devised whereby the directors of the company by a formal vote refused to institute suit in the state court. The nonresident officer and stockholder formally objected to this resolution and voted against it. The next day he, as a citizen of another state and as a stockholder of the corporation, instituted a suit in the federal court against the corporation and

<sup>61</sup> The burden of showing that a party has been collusively made or joined by means of a *mala fide* transfer is on the party who asserts that fact and who seeks to defeat jurisdiction on that ground. The fact must be shown by sufficient evidence to satisfy the court.

Mere suspicion cannot take the place of proof. *Third Nat. Bank v. Seneca Falls* (1883) 15 Fed. 783.

<sup>62</sup> See also *Alabama etc. R. Co. v. Carroll* (1898) 28 C. C. A. 207, 84 Fed. 780.

the other members of the board of directors and also against the city of Detroit, and sought to recover on the corporate right of action against the city. It was held that the suit should be dismissed. Said the court: "It is impossible to read the testimony . . . and not be convinced that the refusal, which constituted the basis of the present suit, was made for the express purpose of enabling a suit to be brought in the federal court, and that no such refusal would have been given if that result had not been desired. . . . The refusal to take legal proceedings in the local courts was a mere contrivance, a pretense, the result of a collusive arrangement to create for one of the directors a fictitious ground for federal jurisdiction."

5. *Cashman v. Amador, etc., Co.* (1896) 118 U. S. 56, 30 L. ed. 72: Sacramento County supposed itself to have a right of action against an hydraulic mining company to enjoin it from depositing debris from its mine in the bed of a river, and desired to sue in the federal court. This however it was unable to do for lack of the requisite citizenship. There happened also to be in that county an alien who was proprietor of land lying on the river and who had an interest like that of the county in abating the nuisance. The county therefore agreed to maintain him in the suit which he proceeded to bring in the federal court. The county was to furnish the attorney and pay other expenses, while the plaintiff himself agreed not to settle without the consent of the county. It was held that the party plaintiff was collusively made, and the suit was dismissed.

6. *Anderson v. Watt* (1891) 138 U. S. 694, 34 L. ed. 1078: Jurisdiction in this suit being dependent on diverse citizenship, a plea was filed by one defendant controverting that fact. Issue was not tried on the plea, and the same defendant relied on the same defense in the answer. The proof corroborated the contention of the defense, and the suit was accordingly dismissed.<sup>64</sup>

7. *Lake County Com'rs v. Dudley* (1899) 173 U. S. 243, 43 L. ed. 684: Suit on coupons clipped from municipal bonds. It appeared from the proof that the plaintiff was not really the owner of the bonds but had permitted his name to be used in order that suit might be brought in the federal court. The case was dismissed without consideration on the merits. The question had not been formally raised by plea or answer.

The following case is likely to prove misleading if it is not carefully discriminated. The suit was an action at law, and the point of jurisdiction was first raised by motion in arrest of judgment. It is doubtful whether its doctrine is entirely applicable to proceedings in equity, where the danger of surprise to either party is appreciably less than in trials at law. Nevertheless, the ideas embodied in the case have had an effect on the courts even in equity causes.

*Hartog v. Memory* (1896) 116 U. S. 588, 29 L. ed. 725: An action was brought in Illinois by a citizen of the kingdom of Holland against one Memory who was

<sup>64</sup> *Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp.* (1890) 136 U. S. 266, 34 L. ed. 363.

alleged to be a citizen of the state of Illinois. The defendant pleaded to the merits and the case went to trial on the issues thus raised. When the defendant was examined in his own behalf, it developed that he was a citizen of Great Britain,—a circumstance which, if available at this juncture, was fatal to the jurisdiction of the court. The point attracted no attention at the time, but after verdict for the plaintiff it was moved in arrest of judgment that the case be dismissed for want of jurisdiction. On error to the supreme court, it was held that no issue having been raised on the question of citizenship, the evidence on this point given by the defendant was irrelevant and should not be noticed.

Chief Justice Waite said: "If in the course of a trial it appears by evidence, which is admissible under the pleadings, and pertinent to the issues joined, that the suit does not really and substantially involve a dispute of which the court has cognizance, or that the parties have been improperly or collusively made or joined for the purpose of creating a cognizable case, the court may stop all further proceedings and dismiss the suit. . . . But the evidence on which the circuit court acts in dismissing the suit must be pertinent either to the issue made by the parties, or to the inquiry instituted by the court; and must appear of record if either party desires to invoke the exercise of the appellate jurisdiction of this court for the review of the order of dismissal. . . . And when the defendant has not so pleaded as to entitle him to object to the jurisdiction, and the objection is taken by the court of its own motion, justice requires that the plaintiff should have an opportunity to be heard upon the motion, and to meet it by appropriate evidence." Again said the same learned judge: "Beyond this, no doubt, if, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition."

The import of this case as the writer interprets it is this: Section five of the Act of March 3, 1875, was intended to prevent frauds on the jurisdiction of the court. The present suit, however, appeared to be brought in good faith and not for any collusive purpose. Practically, the court gave effect in this case to an estoppel *in pais* by which the defendant was precluded from taking an unconscionable advantage of his opponent. The defendant himself was the only one who knew his own citizenship; and when he failed to point out the defect by plea, it was thought proper to deprive him of the right to raise the question after judgment. Nevertheless the doctrine of the case is not to be extended beyond the particular situation; and possibly the decision is, after all, of doubtful authority, except on the point that when a court decides to dismiss a case on its own motion for defect of jurisdiction, it must give the plaintiff a reasonable chance to rebut or controvert the evidence on the point of jurisdiction.<sup>65</sup>

The doctrine of *Hartog v. Memory* has been followed in the lower courts in suits both at law and in equity.<sup>66</sup>

<sup>65</sup> See the observations of Mr. Justice (1889) 3 L.R.A. 502, 38 Fed. 574; *National Masonic, etc. Assoc. v. Sparks* (1889) 129 U. S. 315, 327, 32 L. ed. 690, 694. (1897) 28 C. C. A. 390, 83 Fed. 225.

<sup>66</sup> *Imperial Refining Co. v. Wyman*

1. *Gubbins v. Loughtenschlager* (1886) 75 Fed. 615: The bill contained a sufficient averment of diverse citizenship, and the answer admitted this jurisdictional fact. After the cause had been heard but before a decree had been signed, the defendant sought to amend his answer in respect to the allegation of his own citizenship so as thereby to make it appear that diversity of citizenship did not exist. The amendment was not permitted.

This case is clearly and quite properly within the reason and decision of *Hartog v. Memory*. Said the court in the principal case: "Not only must the objection to jurisdiction based on citizenship be brought squarely before the court, but its presentation must be timely. It is due to the opposite party, as well as to the court, that whatever objection exists affecting the jurisdiction of the court shall be brought before the court at the earliest practicable opportunity."

2. *Hewitt v. Story* (1889) 39 Fed. 158: A plea to the jurisdiction in an equity cause was filed at a juncture when, under accepted rules of pleading, it would be considered too late. It was held that it could not avail. Said the court: "It is one thing for the court, in the interest of justice and in the exercise of the power conferred and duty imposed upon it by the Act of 1875, whenever it has reason to suspect that its jurisdiction is being imposed upon, of its own motion to cause the necessary inquiry to be made to the end that all further proceedings may be stopped, and the suit be dismissed in the event it should be found that a fraud upon its jurisdiction has been committed, and quite another thing for parties to interpose pleas out of the regular and established order of proceedings." 87

### § 379. Suit by Transferee of Legal Title and Beneficial Interest.

Here is a line of cases beginning at an early day whose authority has been in no wise destroyed by the Act of March 3, 1875. The principle involved may be stated thus: Where a conveyance of the subject-matter in dispute has been made to a citizen of another state to enable a federal court to entertain jurisdiction, such transferee may sue in the federal court provided the real interest has been conveyed to him. In this situation, the motive, intention, or purpose with which the conveyance was made is not sufficient to destroy jurisdiction. But the instrument of conveyance must convey the clear title and the beneficial interest also. If the beneficial interest remains in the grantor or assignor, the suit cannot be maintained.

1. *M'Donald v. Smalley* (1828) 1 Pet. 620, 7 L. ed. 237: A bill was filed in the equity side of the circuit court of Ohio by one who alleged himself to be a citizen of Alabama. The object of the suit was to obtain the conveyance of a tract of land situated in the state of Ohio, that being also the state of residence of the defendant. It appeared that the plaintiff claimed under a deed executed by a citizen of Ohio, also that the deed was made in order to put title in the plaintiff so that he, as citizen of a different state, could sue in the federal court. The transfer, however, appeared to have conveyed the legal title and was not colorable

\* Compare *Mattocks v. Baker* (1880) 3 Fed. 455.  
Eq. Prac. Vol. L—15.



in the sense that the suit was brought for the benefit of the person under whom he claimed. It was held that the court had jurisdiction.

2. *Smith v. Kernochan* (1849) 7 How. 198, 12 L. ed. 666: A corporation, being a mortgagee of real property, and being also the payee of the bond which the mortgage secured, found trouble in enforcing its rights in a state court; thereupon it assigned and transferred the mortgage and bond to a citizen of another state, in order that the latter, as such citizen of a foreign state, might sue and enforce the rights under the bond and mortgage, in a federal court. The assignee appeared not to be cognizant of the motive which actuated the transfer by the mortgagee, but acted in good faith in promotion of his own interests and paid a valuable consideration. It was held that he was in the position of an innocent purchaser and was not chargeable with any fraud on the jurisdiction of the court.

3. *Jones v. Leagus* (1855) 18 How. 76, 15 L. ed. 263: Trespass to try title was brought by an alleged citizen of Maryland in the federal court of Texas. A plea in abatement was filed alleging that the conveyance under which the plaintiff derived was merely a fraudulent device designed to confer jurisdiction on the federal court. It appeared from the conveyance in question that it was only colorable, and that the suit was being prosecuted for the benefit of the grantor who was a citizen of Texas. It was held that the court had no jurisdiction. Said the court: "The owner of a tract of land may convey it in order that the title may be tried in the federal courts, but the conveyance must be made *bona fide* so that the prosecution of the suit shall not be for his benefit."

4. *Barney v. Baltimore* (1867) 6 Wall. 280, 18 L. ed. 825: In a bill for the partition of real property in Maryland filed by a citizen of Delaware, it appeared that some of the parties in interest were citizens of the District of Columbia and hence not citizens of a different state in the sense of the act conferring jurisdiction on the ground of diverse citizenship. In the progress of the suit it became manifest that the bill could not be maintained for that reason. Accordingly, the bill was dismissed as to these parties, and they thereupon conveyed their interest to another party who had the requisite citizenship to give jurisdiction. The bill was then amended so as to make this grantee a party and to show the transfer to him of the interests owned by the prior parties, residents of the District of Columbia. It appeared that the transfer was without consideration and was made with the distinct understanding that the grantors retained all real interest in the property, the only purpose of the deed being to put nominal title in the grantee in order to give the federal court jurisdiction. It was held that the device was ineffectual and that the court had no jurisdiction. The interest in question had not really been conveyed.\*\*

The following cases decided subsequent to the Act of 1875 continue the succession of the principle in question.

1. *Manufacturing Co. v. Bradley* (1881) 105 U. S. 175, 26 L. ed. 1034: Suit was brought by the transferee of a negotiable promissory note. It was insisted at the hearing that the transfer was collusive. But the court said that the legal title to the obligation had been conveyed, and overruled the objection.

\*\* Compare *Hurst v. McNeill* (1804) 1 Wash. C. C. 70; *Briggs v. French* (1826) 2 Sumn. 251, 252.

2. *Crawford v. Neal* (1892) 144 U. S. 585, 36 L. ed. 552: Creditors' bill to set aside conveyances of real property. The judgments held by the plaintiff had been transferred to him by the persons who recovered them. On the question of jurisdiction as affected by the *bona fides* of this transfer, it was said: "If the transfers of the judgments to the complainant were fictitious, the plaintiffs therein continuing to be the real parties in interest, and the complainant but a nominal or colorable party, his name being used only for the purpose of jurisdiction, then the objection to the jurisdiction of the circuit court would be well taken; but if the transfers were absolute and the judgment creditors parted with all their interest for good consideration, then the mere fact that one of the motives of the purchase may have been to enable the purchaser to bring suit in the United States court, would not be sufficient to defeat the jurisdiction."

### § 380. Tendency of Late Cases.

The following cases evince a tendency on the part of the federal courts to scrutinize transfers made by persons who are not competent to sue in these courts to persons who are competent thus to sue, with a more hostile eye than was usual before the Act of 1875. As emphatically said by Mr. Justice Bradley in the first of these cases, it was the intent of Congress to prevent and put an end to all collusive arrangements made to give jurisdiction, where the parties really interested are citizens of the same state.

1. *Little v. Giles* (1886) 118 U. S. 596, 30 L. ed. 269: Jurisdiction in a suit to quiet title was dependent on the citizenship of one Giles. The interest held by him was acquired by a deed executed under an agreement to pay the grantors a part of the proceeds of such property as might be recovered in the suit. The supreme court was satisfied the deed was collusively made for the mere purpose of giving jurisdiction, and refused to entertain the suit. The objection in this case was raised by answer.<sup>61</sup>

2. *Lehigh Mining etc. Co. v. Kelly* (1895) 160 U. S. 327, 40 L. ed. 444: In this case "a highly ingenious and novel mode" was devised to get the controversy into the federal court, but the plaintiff was rebuffed. A Virginia corporation wished to sue for lands lying in that state but could not itself bring suit in the federal courts. Thereupon certain of its stockholders and officers went into Pennsylvania and there organized a new company. To this company the Virginia corporation transferred its interests in the Virginia lands, and the transferee thereupon instituted suit in the federal courts to recover those lands of the defendant, a citizen of Virginia. It was admitted that the purpose in organizing the Pennsylvania company and in making the conveyance to it was to give the federal court jurisdiction, but it was also admitted that the conveyance actually passed all the interest of the Virginia corporation and that it retained no actual beneficial interest. The suit was dismissed, three judges dissenting. The court observed that while the grantee had not in fact bound itself to reconvey, yet the conveyance was not for a valuable consideration, and consequently the grantee could at any time be com-

<sup>61</sup> *McLean v. Clark* (1867) 31 Fed. 501; *Simon v. House* (1891) 46 Fed. 319,

pelled to reconvey. This left a sufficient beneficial interest in the grantor to deprive the court of jurisdiction and to defeat the scheme.<sup>70</sup>

Before a suit can be held to have been collusively made it must appear that the actual party plaintiff was implicated in the collusive act. A plea on this ground that does not impugn his conduct is bad.<sup>71</sup>

### § 381. Statute Inapplicable Where Judgment Already Entered.

The act requiring the courts to dismiss suits at any time when it may become apparent that the cause is not one within the jurisdiction of the court does not apply so as to authorize the court to set aside a final judgment already entered and satisfied, upon the fact being brought out that the suit was collusively made.<sup>72</sup>

#### *Place of Bringing Suit.*

### § 382. District Where Suit to Be Brought.

As the federal courts are at present organized there are, in most of the states, two or more districts each of which has its own circuit and district court; and the successive judiciary acts have always contained some provision or other as to the particular district in which suits are to be brought. For instance, the judiciary act now in force contains a proviso exempting defendants generally from suit in other districts than that in which they reside. But there is a qualification to this proviso in the rule that where jurisdiction depends on diverse citizenship, the suit may be brought in any district where either the plaintiff or defendant resides.

### § 383. Question Not One Affecting Essential Jurisdiction.

In discussing matters of pleading and practice arising under this and similar provisions, it is to be observed that the question thus presented is, generally speaking, not a matter that goes to the essential jurisdiction of the court. If a suit is of such nature that it can certainly be brought in some federal court or another, that is, if the subject-matter of the suit or the character of the parties is such that a federal court of some state or district has jurisdiction to entertain

<sup>70</sup> Compare *Irvine Co. v. Bond* (1886) 74 Fed. 849.

<sup>71</sup> *Morton Trust Co. v. New York & O. R. Co.* (1900) 105 Fed. 539.

<sup>72</sup> *Muhlenburg County v. Citizens' Nat. Bank* (1894) 65 Fed. 537.

it, then the question whether that suit should be brought in one particular state or district rather than in another is not a question of jurisdiction at all. It is rather a question of venue, using this word in the sense of the civil division from which the jury must be gathered and in which the cause, if an equity one, should be tried. True, the term jurisdiction is frequently used in this connection and as a result some confusion has appeared in the cases. But the higher courts, and especially the supreme court, have constantly insisted on the distinction between the question of essential jurisdiction and the question of the mere place of bringing suit. As commonly put, the distinction is one between essential jurisdiction on the one hand and an exemption from process on the other.

1. *Interior Construction Co. v. Gibney* (1895) 160 U. S. 219, 40 L. ed. 401: In this case the distinction in question was brought out by Mr. Justice Gray in these words: "The circuit courts of the United States are vested with general jurisdiction of civil actions, involving the requisite pecuniary value, between citizens of different states. Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties; but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election."

2. *Ex p. Schollenberger* (1877) 96 U. S. 869, 24 L. ed. 853: In construing the provision of the statute relating to the place of suing, Chief Justice Waite said: "The act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

3. *Southern Express Co. v. Todd* (1893) 5 C. C. A. 432, 56 Fed. 104: The plaintiff was a citizen of Texas, the defendant a citizen of Georgia. The suit was brought in Arkansas and service was there obtained on the defendant. Under the statute the defendant was exempt from suit in Arkansas because where jurisdiction is dependent on diversity of citizenship the suit must be brought in a district where one of the parties resides. The defendant, however, pleaded to the merits, and judgment went against him. A motion was then entered by him to dismiss the suit on the ground that the court had no jurisdiction, and it was insisted that as the defect was apparent on the record, the case should be dismissed as provided in section five of the Act of March 3, 1875. But the motion was overruled. Said Sanborn, Circuit Judge: "The vice of this contention lies in the fact that it confounds the jurisdiction of the court with the personal privilege of the party. When an action is brought in a circuit court, and it appears from the complaint or the record that there is a controversy between citizens of different states, and that the amount in dispute is sufficient under the acts of Congress, that

court has jurisdiction, although it may not be brought in the district of the residence of either the plaintiff or the defendant. The essential jurisdictional facts in such a case are the diverse citizenship, and the amount in controversy. These facts must, no doubt, appear upon the record, and where they do not appear the federal courts may take notice of their absence, and dismiss the case at any stage of the proceedings. . . . No case has been cited, however, where any federal court has dismissed an action on the sole ground that it was brought in the wrong district, after the defendant had appeared generally, or pleaded to the merits, without first objecting that the action was not brought in the district of the residence of either of the parties to the action. This objection relates, not to the jurisdiction of the court, but to the personal privilege or exemption of the defendant."

#### § 384. Jurisdiction and Venue Distinguished.

The reader will note that the term venue has not been generally used in bringing out the distinction in question, but there seems to be no good reason why it should not be. In the sense in which we now use the word, it may be said that the question of venue and the question of jurisdiction are wholly different and distinct. The question of jurisdiction goes to the power of the federal court to entertain and determine the suit. The question of venue is concerned only with the matter of the particular district in which suit should be brought. The first is a question of power. The second is rather a question of practice. Jurisdiction cannot be conferred by the consent of the parties and the want of it cannot be waived. The venue is a matter of personal privilege and can therefore be waived by the party concerned.

#### § 385. When Question of Venue Involved with Jurisdiction.

Though, as just stated, the question of jurisdiction is to be carefully distinguished from the question of venue, there is yet one situation in which the two questions are identical, as the following decision will show. Here the question of the venue or district in which suit is to be brought becomes a question of jurisdiction and is to be treated as such. This peculiar situation arises in cases where jurisdiction is dependent on diverse citizenship and there are several parties either plaintiff or defendant. Here if the suit is brought in a state or district where one or more of these reside and it appears that another one or more of them reside in a different state or, if they reside in the same state, in a different district from that in which the suit is brought, then the court has no jurisdiction.

1. *Smith v. Lyon* (1890) 133 U. S. 315, 33 L. ed. 435: There were two plaintiffs, one a citizen of Missouri and a resident of the eastern district of that state, the

other a citizen of Arkansas. The defendant was a citizen of Texas. The suit was brought in the eastern district of Missouri. The defendant pleaded in abatement to the jurisdiction of the court and insisted that inasmuch as the suit was not brought in the district where he (the defendant) lived, it must be brought in the district where both the plaintiffs lived; and furthermore, inasmuch as it was impossible for the plaintiffs to sue in a district where they both lived, because they lived in different states and districts, therefore jurisdiction failed altogether. This contention was upheld and the suit was dismissed. The court was careful to point out that the case is different where there is only one plaintiff. Here it is sufficient, so far as the matter of jurisdiction is concerned, that the suit is brought in the state where such sole plaintiff lives.<sup>73</sup>

2. *Essexior Pebble Phosphate Co. v. Brown* (C. C. A.; 1896) 20 C. C. A. 428, 74 Fed. 321: The plaintiffs in a bill asking for a receiver were citizens and residents of Pennsylvania. The suit was brought in West Virginia against defendants, one of whom was a citizen of West Virginia and a resident of the district, while another was a citizen and resident of New York. It was held that the court had no jurisdiction, and a plea thereto was sustained. This decides the converse of *Smith v. Lyon*. "If there are more than one defendant, all must reside in the district wherein suit is brought."<sup>74</sup>

3. *Lengel v. American Smelting etc. Co.* (C. C. A.; 1901) 110 Fed. 19: In this case, which was similar to the last, Gray, Circuit Judge, after referring to certain decisions of the supreme court, said: "The cases in the supreme court just referred to were, it is true, dealing with the question of diverse citizenship only as a ground of jurisdiction, but the reasoning by which the conclusion is reached that all the indispensable parties must be competent to sue or be sued, in order to support the jurisdiction, is applicable to the requirements of the Act of 1888, upon which the motion to dismiss is grounded. Where the jurisdiction, therefore, is founded only on the fact that the action is between citizens of different states, as is the case here, the requirement of the act plainly is that suit must be brought either in the district where all the plaintiffs, if they be more than one, reside, or in the district where all the defendants, if they be more than one, reside."

### § 386. Defect of Venue Waived by General Appearance.

The first point to be noted in regard to the practice in cases where the question is merely one of venue and not of jurisdiction is that the defendant, if he wishes to take advantage of a defect of venue, must not enter a general appearance. The entering of an unqualified general appearance operates as a waiver of the defect.<sup>75</sup> This

<sup>73</sup> Compare *Greeley v. Lowe* (1894) 10 L. ed. 699; *Foot v. Association* (1889) 39 Fed. 23; *Fosha v. W. U. T. Co.* (1902) 114 Fed. 701; *Smith v. Atchison etc. R. Co.* (1894) 64 Fed. 1;

<sup>74</sup> *Freeman v. Am. Surety Co.* (1902) 116 Fed. 648; *Chesapeake etc. R. Co. v. Fire Creek etc. Co.* (1902) 119 Fed. 942; *Jenkins v. York Cliffs Imp. Co.* (1901) 110 Fed. 807. *Foult v. Gray* (1902) 120 Fed. 156; *Memphis Sav. Bank v. Houchens* (1902) 82 C. C. A. 176, 115 Fed. 96; *Purcell v. British Land & Mortgage Co.* (1890) 42 Fed. 465; *Page v. City of Chillicothe* (1881) 6 Fed. 599.

<sup>75</sup> *Bank v. Morgan* (1889) 132 U. S. 141, 33 L. ed. 282; *McCormick v. Walters* (1890) 134 U. S. 41, 33 L. ed. 833; *Levy v. Fitzpatrick* (1841) 15 Pet. 167,

rule is, of course, the same whether the appearance be entered by the defendant in person or by his attorney.<sup>76</sup>

*Mooney v. Delaware etc. R. Co.* (1895) 68 Fed. 1: The plaintiff was a citizen of New Jersey, and the defendant a citizen of Pennsylvania. The suit was brought in New York. A general appearance was entered, accompanied by a demand of service of all papers on the attorney appearing. It was held that the irregularity as to the district in which the suit was brought was thereby waived.

### § 387. General Demurrer Waives Venue.

The filing of a general demurrer to the bill or declaration also waives the venue, and the filing of a special demurrer to the merits has the same effect. Furthermore, a demurrer that enumerates several grounds of objection to the bill operates as a waiver of the venue, if either ground stated in the demurrer goes to the merits.<sup>77</sup>

*St. Louis etc. R. Co. v. McBride* (1891) 141 U. S. 127, 35 L. ed. 650: The defendant was sued in the wrong district but appeared and filed a demurrer based on three grounds, (1) lack of jurisdiction over the person, (2) lack of jurisdiction over the subject-matter, and (3) that the complaint stated no cause of action. It was held that inasmuch as the demurrer went to the merit, the defect as to venue was waived.

### § 388. Answer and Trial on Merits Waive Venue.

Similarly a plea or answer to the merits waives any objection that could be taken in respect to the district in which the suit is brought,<sup>78</sup> and of course an objection to the venue cannot be raised after trial and judgment on the merits, either in the court where the trial took place or in the appellate court.<sup>79</sup>

*Southern Express Co. v. Todd* (1893) 5 C. C. A. 432, 56 Fed. 104: The plaintiff was a citizen of Texas, the defendant a citizen of Georgia. The action was brought in Arkansas, and service was obtained on the defendant there. The defendant pleaded to the merits and after adverse judgment moved to dismiss, but the motion was denied.

<sup>76</sup> *Interior Construction Co. v. Gibney* (1900) 99 Fed. 247. It would seem to be good law that one who has answered (1895) 160 U. S. 217, 40 L. ed. 401.

<sup>77</sup> *Texas etc. R. Co. v. Cox* (1892) 145 U. S. 593, 803, 36 L. ed. 829, 832; *Noonan v. Delaware etc. R. Co.* (1895) 68 Fed. 1; *Scott v. Hoover* (1900) 99 Fed. 247; *Lowry v. Tile etc. Co.* (1899) 98 Fed. 817; *Grove v. Grove* (1899) 93 Fed. 865; *Fosha v. W. U. T. Co.* (1902) 114 Fed. 701.

<sup>78</sup> *Toland v. Sprague* (1836) 12 Pet. 300, 9 L. ed. 1093; *Scott v. Hoover*

to the merits is precluded from subsequently raising the question as to the venue although by leave of the court an order is entered allowing him to withdraw the answer and file a demurrer. <sup>79</sup> *Hatch v. Ferguson* (1893) 57 Fed. 966; *Carter Crume Co. v. Penrning* (1898) 20 C. C. A. 174, 56 Fed. 429.

### § 389. Acts That Do Not Constitute Waiver of Venue.

The following decisions show that not every step that a defendant may take looking to a defense on the merits will operate as a waiver of the question of venue.<sup>80</sup>

1. *Pacific Mutual Ins. Co. v. Tompkins* (1900) 41 C. C. A. 488, 101 Fed. 539: The defendant was sued in a district where it was exempt from service. A plea in abatement was filed attacking the jurisdiction of the court. The plaintiff's replication averred that the objection was waived by the defendant by reason of the fact that said defendant had appeared at the examination of witnesses whose depositions had been taken before the issues in the suit were made up. It was held that this did not constitute a waiver of the defect, and the plea was sustained. The court said it was a commendable precaution on the part of the defendant to be present at the taking of the depositions by his opponent.

2. *Southern Pac. Co. v. Denton* (1892) 146 U. S. 202, 36 L. ed. 942: The plaintiff was a citizen of Texas and a resident of the eastern district of that state. The defendant was incorporated under the laws of Kentucky. The suit was brought in the western district of Texas. The defendant demurred specially on the ground that it was exempt from suit in that district. The plaintiff relied on a state statute which required the defendant, as a condition on which it was permitted to do business in that state, to file with the secretary of state a resolution authorizing service of process to be made on any officer or agent of the company in that state. It was insisted that by complying with this statute the defendant corporation waived its privilege of objecting to the venue. But it was held not so, and the suit was dismissed.<sup>81</sup>

### *Raising Question of Exemption from Suit in Particular District.*

### § 390. Special Appearance to Test Question of Venue.

From what has been said it follows that the defendant who wishes to take exception to the venue should never enter a general appearance. If a voluntary appearance is made at all, it should be noted as being made solely for the purpose of testing the right of the plaintiff to maintain the suit in that district and for no other purpose. The best plan is for the defendant to wait until service is had and then to appear specially and raise the question by motion to vacate the service, by special demurrer to the bill, or by a special plea in abatement. Whichever of these alternatives the defendant pursues, his motion, demurrer, or plea should contain in its introduction a

<sup>80</sup> Acceptance of service does not operate as a waiver of objection to the place of being sued. *United States v. Loughrey* (1890) 43 Fed. 449. (1895) 160 U. S. 221, 40 L. ed. 402. The law was different under the judiciary act of 1875 which permitted the corporation to be sued wherever found in a state. *Es p. Schollenberger* (1877) 151 U. S. 496, 38 L. ed. 248; *Re Keasbey* 96 U. S. 369, 24 L. ed. 853.



recital of the fact that the defendant appears only for the purpose of excepting to the service or for the purpose of questioning the right of the plaintiff to maintain the suit in that district and that he does not appear generally or for any other purpose.<sup>32</sup>

### § 391. Motion to Vacate Service.

A special motion to vacate the service is perhaps the most satisfactory way to test the question of venue, and this is the method commonly adopted where the defect appears on the record.<sup>33</sup> Where the defect is not apparent on the face of the record, affidavits could possibly be used in support of the motion; but if the facts are controverted, the defendant should be required to resort to a plea, as hereinafter stated.

### § 392. Demurrer on Question of Venue.

The special demurrer supplies a very satisfactory means of testing the question of venue where the bill or declaration shows affirmatively on its face that the suit has been brought in the wrong district.<sup>34</sup>

There is authority in circuit court decisions to the effect that a demurrer will lie in every case where the declaration or bill in a suit brought in the state of which the defendant is a citizen fails to allege that the defendant or defendants reside in the district where the suit is brought. The supreme court has decided that this is the case where there are several defendants, but it has never been held in that court or in the circuit court of appeals that the same is true where there is only one defendant. The reasoning of the cases on the contrary leads to the opposite conclusion, and the circuit court cases

<sup>32</sup> For form of introduction to a plea in abatement see *Mexican Central R. Co. v. Pinkney* (1893) 149 U. S. 194, 196, 37 L. ed. 699, 700. 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. 44; *Coal Co. v. Blatchford* (1870) 11 Wall. 172, 20 L. ed. 179; *Reinstadler v. Reeves* (1887); 33 Fed. 308; *Miller-Magee Co. v. Carpenter* (1888) 34 Fed. 433; *Halstead v. Manning* (1888) 34 Fed. 565.

A special appearance in the federal court made for the purpose of testing the validity of the service and of raising the question of venue will not be treated as a general appearance for the next term even though a local state statute so provides. *Mexican Cent. R. Co. v. Pinkney* (1893) 149 U. S. 194, 37 L. ed. 699. In *Southern Pac. Co. v. Denton* (1892) 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. 44, the defendant in an action at law by leave of court filed "an answer or demurrer," as it was called, for the special purpose of raising objection as to the venue. This was treated as a demurrer.

<sup>33</sup> *Shaw v. Quincy Mining Co.* (1892) 145 U. S. 444, 36 L. ed. 768.

<sup>34</sup> *Southern Pac. Co. v. Denton* (1892)

cited below are probably wrong, because they apply the rule which prevails in regard to plural parties to cases where there is only one plaintiff or defendant.<sup>85</sup>

**§ 393. Distinction between Case of Plural Parties and Single Parties.**

The true rule seems to be that where there are several parties on one side, the bill must show that all live in one district, for here jurisdiction is involved; but if there is only one party on either side then the fact of residence in the particular district where suit is brought need not be affirmatively shown in order to confer jurisdiction. When it is not so shown, the defendant is driven to his plea in order to show that the suit is improperly brought. The following case appears to have been correctly decided, because there were two defendants, not one, and the question whether they resided in the same district with each other, and where the suit was brought, was clearly jurisdictional.

*Harvey v. Richmond etc. R. Co.* (1894) 64 Fed. 19: A bill in equity alleged that the plaintiffs were citizens of Maryland and that the defendants were citizens of Virginia. The residences of none of the parties were stated. A demurrer based on the failure to allege the defendants' places of residence in Virginia was sustained as a demurrer to the jurisdiction.

**§ 394. Plea Raising Issue on Question of Venue.**

Where the defect of venue is not apparent on the face of the bill or other pleading of the plaintiff, the proper means by which to test the question is found in the special plea in abatement directed solely to this point.<sup>86</sup> A special plea to the jurisdiction is, in effect, a plea in abatement to the jurisdiction and will be treated as such.<sup>87</sup>

**§ 395. Who May Object to Venue.**

In conclusion it should be noted that where there are several defendants, some of whom are not subject to be sued in the district in which suit is brought, the suit will be dismissed as to them on timely objection; but their co-defendants who are properly subject to suit in that court cannot raise the point. The objection to the venue is

<sup>85</sup> *Laskey v. Newtown Mining Co.* *Pacific Mut. Life Ins. Co. v. Tompkins* (1892) 50 Fed. 634; *Miller v. Pennsylv.* (1900) 41 C. C. A. 48, 101 Fed. 539.

*Vanina R. Co.* (1899) 91 Fed. 298.

<sup>87</sup> *Pacific Mut. Life Ins. Co. v. Tompkins*

<sup>86</sup> *Mexican Central R. Co. v. Pinkney* (1900) 41 C. C. A. 488, 101 Fed. (1893) 149 U. S. 194, 37 L. ed. 699; 539, 541.

personal to the individual defendant.<sup>88</sup> A party who is properly made defendant cannot complain that other defendants are not inhabitants of the district.<sup>89</sup> For a still stronger reason, the plaintiff cannot himself raise the objection when the suit takes such a turn that it becomes desirable for him to get out. This rule has been applied in the case of a cross bill.<sup>90</sup>

<sup>88</sup> *Improvement Co. v. Gibney* (1895) *v. Atchison, etc. R. Co.* (1894) 64 160 U. S. 217, 40 L. ed. 401; *Lowry v. Tile etc. Co.* (1899) 98 Fed. 817; *Citizens' Bank & Trust Co. v. Union Mining & Gold Co.* (1900) 106 Fed. 97; *Smith* <sup>89</sup> *Lowry v. Tile etc. Co.* (1899) 98 Fed. 817. <sup>90</sup> *Callahan v. Hicks* (1898) 90 Fed. 539.

## CHAPTER IX.

### MULTIFARIOUSNESS IN BILL.

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*General Principles Pertaining to This Subject.***§ 396. Equity Procedure as Adapted to Settlement of Complicated Causes.**

One of the most striking and distinctive features of equity procedure is found in its adaptability to the purpose of solving complicated cases. In no respect is its superiority to legal procedure more apparent than in this. The common-law courts cannot deal satisfactorily with a controversy to which there are more than two parties or sets of parties; and innumerable cases arise where, from the number of conflicting interests or from the varying attitude of the several parties, the law courts are utterly incompetent to give any relief, or at least any adequate relief. But the law's extremity is equity's opportunity. That complexity which is often an insuperable obstacle to the proper administration of justice in the court of law is one of the very grounds for the exercise of equitable jurisdiction. It cannot, indeed, be truly said that this court delights in complication, but it can be truly said that no complication of interests or of parties supplies too severe a strain for its machinery. There is a saying that courts of equity delight to do complete justice and not by halves. This maxim has grown out of the desire of the court completely to decide every matter involved in the litigation, so that there may be no roots of controversy left out of which other suits may spring.

**§ 397. Equity Insists on Determining Whole Controversy.**

Not only this, the court of equity does not encourage, and sometimes will not even tolerate, the bringing of a suit to settle only a part of a controversy, where the whole may be conveniently determined in one suit. It will not allow a single cause of action to be split up into two or more branches. Thus a bill will not lie for a part of an account. The suit should cover all the matters of account.<sup>1</sup>

**§ 398. Scope of Suit Limited to Proper Issues.**

Now it is not to be supposed, merely because the procedure of the court of equity is well adapted to the solution of complicated causes, that this court should for that reason unduly encourage the bringing of complicated matters before it. Naturally the court requires that each particular suit or controversy, as presented to it, should first be reduced to its simplest practicable terms, so to speak. There is a limit to the legitimate ramifications of every controversy. So far as it may be necessary to follow out the threads in order to do complete justice in the particular suit or controversy the court will pursue them, but so far as this is not necessary the parties will be left to get their rights adjusted in some other way or in some other suit. What we mean by this is that the court of equity, in each suit, will confine itself as far as practicable to the matters and issues properly incident to the single controversy. It will not permit anything and everything to be brought into one suit. No question connected with equity practice has given more trouble or has been more fully examined than that which pertains to the legitimate scope of the suit in equity. What matters and subjects can be brought within the compass of one bill? This is sometimes very difficult to answer, and it is not made easier by the existence of the great number of decisions in which the question has been dealt with in one aspect or another.

**§ 399. When Bill Said to Be Multifarious.**

If a bill in equity has too large a scope, in the sense of embracing more than one subject-matter or in the sense of bringing parties into the controversy who are not necessarily or properly connected with it, so that for this reason the court of equity will refuse to entertain the suit, the bill is said to be multifarious. This expression refers to the manifold character and too great complexity of the issues

<sup>1</sup> *Pardey v. Pardey* (1861) 1 Vern. 28.

presented in the suit. Of course in different suits different degrees of complexity may well be tolerated. It is only when too many issues, matters, or parties are brought in, that the bill is said to be multifarious.

Multifariousness may be defined as the improper joining of distinct and independent matters in one bill, or the improper joinder of parties not connected with the controversy, in its proper and legitimate scope. If the situation is such that the court will tolerate the joining of several different matters in the one suit—as it always will when this is absolutely necessary to the doing of complete justice and to the proper solution of the main controversy—the bill is not said to be multifarious, howsoever complex it may be. Multifariousness is a purely relative term and simply means that degree of complexity which the court will not tolerate under the particular circumstances and conditions of the case. It is the “attempt to embrace in the same suit two or more distinct subjects, whether it be the uniting in one bill of several unconnected matters against a single defendant, or the demand of several matters of an independent nature against several defendants.”<sup>2</sup>

#### § 400. Subject Not Reducible to Definite Rules.

In this chapter we shall attempt to make an intelligible presentation of the principles, rules, and considerations by which the courts are governed in determining whether a bill is multifarious or not, as those principles, rules, and considerations have been worked out in the federal courts. However, it may be said at once that the general principles applicable here are very few. What has been said on this subject by the courts is valuable as embodying suggestions rather than as embodying general principles. As a consequence general statements, even when they are carefully formulated by the courts, are not very helpful except in so far as they are interpreted in relation to the particular facts of the case. In no department of equity pleading and practice is it more necessary to analyze the cases with care. This will be our excuse for presenting the subject of multifariousness with fuller illustrations than might otherwise be deemed desirable. It is reasonable to suppose that where the courts have had much trouble heretofore they will encounter difficulties hereafter. We shall present a considerable number of illustrations carefully drawn from the cases. They are not all harmonious, but they serve

<sup>2</sup> *Norris v. Hassler* (1884) 22 Fed.401, 403.

well enough to indicate the range of judicial discretion applied in regard to this subject.

**§ 401. Each Case Must Be Determined on Own Facts.**

We begin by observing that the sum and substance of all the wisdom to be collected from the decisions is that each case must be determined on its own peculiar circumstances. No suit furnishes any absolute criterion for a different suit. The whole subject of multifariousness depends upon considerations of propriety and convenience taken with due reference to the circumstances of each case. This truth certainly simplifies the problem very much, and a frank recognition of it by the courts is calculated greatly to lighten their labor in dealing with the subject. The trouble is that this very simple principle has been a long time in obtaining recognition. During a great part of the past the courts of equity seem to have struggled with the problem of multifariousness on the supposition that some definite criterion existed or might be discovered by reference to which all doubts could be resolved in every case, but no sooner had any one rule been formulated than cases arose to upset it. In the end, the inconsistent results reached in the different cases gradually brought the courts to a recognition of the truth that the question of multifariousness is one to be determined on the peculiar facts of each case.

**§ 402. Tendency of Late Decisions.**

The later cases show an increasing tendency to avoid the application of strict and technical rules and to deal with the objection of multifariousness as being one addressed to the sound discretion of the court. The discretion of the court must be appealed to, but that discretion will always of course be exercised within the limits of the principles which govern good pleading, and with an eye to considerations of convenience.\*

**§ 403. Judicial Discretion.**

A discretion to be exercised "within the limits of the principles which govern good pleading" supplies then a starting point for our discussion; but this sinister expression—"within the limits of the principles which govern good pleading"—itself embodies a limitation which threatens to confound us and in a measure to destroy the value

\* *Lahigh Zinc etc. Co. v. New Jersey New Hampshire etc. Bank v. Richey Zinc etc. Co.* (1890) 43 Fed. 545, 548; (1903) 58 C. C. A. 294, 121 Fed. 966, Eq. Prac. Vol. I.—16.



of the proposition as a whole. We must constantly bear in mind that the rules that may be laid down are to be taken as suggestive merely and not as precise definitions of unbending rules of practice. The idea that the question of multifariousness must always be determined on the particular facts of each case upon due reference to consideration of discretion, convenience, and administrative policy, has been well expressed by the courts on many occasions. One of the best expositions of it is found in a case tried at circuit before Brewer and Thayer, JJ.

*Chaffin v. Hull* (1890) 39 Fed. 887, 890: Certain lands were sold to C. and a deed was drawn conveying the property to her. By a mistake of the scrivener the deed conveyed only a life estate to her with remainder to her heirs, whereas it should have been made to convey a fee simple to her. Afterwards the mistake was discovered, and a bill was filed in the courts of the state where the land lay to reform the deed. A decree to this effect was rendered, but it so happened that the heirs at law of C. were not made parties to the bill. By subsequent conveyances, the title to the property, ostensibly a fee simple interest, passed to one Chaffin who subsequently became aware of the defect in his title. Chaffin employed one Hull to represent him as his agent in the management of the property and informed him of the defect in the title. After the death of Chaffin, Hull was retained as agent for the property and, while acting in this capacity, entered into a conspiracy with other persons whereby the interest of the heirs of the original grantee were bought up in the name of one of the conspirators. While apparently continuing as agent for the parties who claimed through Chaffin, Hull, in furtherance of the conspiracy, caused legal proceedings to be instituted. These were collusively conducted, with the result that possession was transferred to this purchaser. On these facts, a bill was filed by the parties claiming under Chaffin. The prayer was to the effect, first, that the court should decree that the prior reformation of the deed by the court of the situs was effective even against the heirs of C. though they had not been made parties to that proceeding; secondly, if such relief could not be granted, that the court should now decree a reformation of the original deed correcting the mistake as against the heirs and remaindermen; thirdly, if relief could not be granted under either of the other alternatives, that the court should decree that the proceedings by which the legal title to the remainder interests had become vested in the co-conspirator of Hull were in breach of trust, and that said title was acquired and held in trust for the plaintiffs.

It was insisted that the bill was clearly multifarious, but this contention was overruled. Said Thayer, J.: "The bill unquestionably states two distinct grounds for equitable relief. In the first place complainants seek to establish their title and right to the possession of a certain piece of property by the reformation of a deed under which defendants claim and hold possession. In the second place, they charge the defendants with having acquired the title which they now hold by acts that were constructively fraudulent, and on that ground they ask a decree adjudging that the defendants hold the property as trustees for the complainants. Because complainants seek relief on two distinct and independent equitable grounds, the bill under some circumstances might be adjudged multifarious. But it is apparent that the parties proceeded against are proper parties to the

bill considered in either aspect, and that none of the defendants can say that they are called upon to answer charges in which they have individually no concern. Furthermore, while two grounds of relief are stated, yet the relief sought in each instance affects the title to one and the same piece of property, and concerns all of the defendants. If we should hold the bill to be multifarious and compel the complainants to elect on which ground they will stand and proceed to trial, I can see no reason why they might not file a second bill, if defeated on the first, alleging in such second suit the same cause of action that we compel them to abandon in this. Defendants must, in any event, as it appears to me, meet the averments of the bill in both of its aspects, either in this suit, or in another suit. If the bill is retained in its present form, I cannot see that it will occasion any confusion in putting in the proofs, or interfere with the orderly conduct of the trial, or put the defendants to any disadvantage. If it shall appear that the form of the bill has enhanced the costs unnecessarily, we can easily regulate that matter by appropriate orders at the conclusion of the case."

In the same case *Brewer, J.*, used these words: "Distinct and independent causes of action cannot be conjoined in the same suit; and yet it has been said by the supreme court, and is the voice of many authorities, that no fixed rule can be laid down as to the matter of multifariousness; that each case must stand upon its peculiar facts, and while independent causes must not be joined in one bill, neither should a defendant be unnecessarily burdened with two suits. Now in this cause the complainants are all interested in the one result; the defendants also are all jointly interested. There is no difference of interest between any two of the complainants or any two of the defendants. The ultimate result sought to be reached by the bill upon whichever claim it may be obtained is the same, to wit, a decree that the complainants are the owners of the full equitable title; that the defendants hold the legal title, and hold that title in trust for the complainants, and ought to be divested of it, and ought to surrender possession, and ought to account for rents and profits. So, there being a unity of interest in the parties complainant and the parties defendant, a single property the subject-matter of litigation, and a single ultimate purpose the object of the suit, we have concluded that in the interests of justice and equity, and a speedy settlement of the title to that property, the court is justified in holding that the bill is not multifarious."

1. *Hale v. Atkinson* (1903) 188 U. S. 77, 47 L. ed. 392: On this point of multifariousness as affected by the considerations of convenience and utility in each case, Mr. Justice Peckham said: "Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties. the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any."

2. *Chisholm v. Johnson* (1901) 106 Fed. 191, 211, per Bradford, J.: "The objection of multifariousness is one which addresses itself to the sound discretion of the court to be exercised with a view to the position of the parties and the

circumstances of the particular case, but not without regard to fundamental principles controlling equity procedure. While care should be taken to avoid a departure from those elementary rules which long experience has shown best calculated on the whole to secure simplicity and certainty in the determination of litigated cases and prevent an unnecessary and embarrassing joinder of parties or causes of action in one suit, it equally should be observed to avoid the annoyance and expense which would result from an unnecessary multiplicity of suits."

3. *Allen v. Luke* (1906) 141 Fed. 694, 695, Lowell, Circuit Judge, observed: "It is not possible to state with precision a test of multifariousness universally applicable. The court is of opinion that the trial and decision of the matters herein presented concerning all these defendants can most conveniently be had in one proceeding, and that this may be done without injustice to anybody."

4. *Mills v. Hurd* (1887) 32 Fed. 129, Shipman, J., said: "I have intentionally refrained from a discussion of the general principles in regard to multifariousness, mindful that the attempt to state abstract propositions in regard to the subject is not fruitful of benefit. 'Every case must be governed by its own circumstances.'"<sup>4</sup>

5. *Westinghouse Air Brake Co. v. Kansas City So. R. Co.* (C. C. A.; 1905) 71 C. C. A. 1, 137 Fed. 26, 31, per Sanborn, Circuit Judge: "The vice of multifariousness is the union of causes of action which, or of parties whose claims, it is either impractical or inconvenient to hear and adjudicate in a single suit. Where this vice does not exist, where it is as practical and convenient for the court and the parties to deal with the claims or causes of action presented, and the parties joined by a petition, in one suit as in many, the pleading is not multifarious, and it should be sustained. It is more practical and convenient to hear and determine all the claims a petitioner makes for the same relief against the same defendant in a single suit than in several actions, and, to prevent a multiplicity of suits and compel the presentation of all such claims in the same action, the rule has been established that a judgment between the same parties upon the same demand estops them from again litigating every admissible matter which might have been offered to sustain or defeat that claim or demand. Hence the union of several causes of action for the same demand or relief in a bill or petition does not constitute multifariousness."<sup>5</sup>

#### § 404. Objection of Multifariousness Not Favored by Courts.

The objection of multifariousness is not looked upon with much favor, and it is one that addresses itself to the discretion of the court. A suit will not be thrown out for this fault except in a clear case. Though a bill is multifarious, in the sense of embracing more than one subject, it will yet be sustained if such procedure is necessary or highly conducive to the administration of justice. The rule against multifariousness looks to the prevention of needless expense, complex-

<sup>4</sup> *Citing Gaines v. Chew* (1844) 2 How. 125 Fed. 819; *Hayden v. Thompson* 619, 11 L. ed. 402. (1895) 17 C. C. A. 592, 71 Fed. 60;

<sup>5</sup> See *Cromwell v. County of Sac, Stafford Nat. Bank v. Sprague* (1881) (1876) 94 U. S. 351, 24 L. ed. 195; *Board v. Board* 8 Fed. 377; *Weir v. Bay State Gas Co. of Com'rs v. Platt* (1897) 25 C. C. A. 87, (1898) 91 Fed. 940. 79 Fed. 567; *Moody v. Flagg* (1903)

ity of the proceedings, and unnecessary prolixity of the pleadings, all of which manifestly tend to delay and annoyance.<sup>6</sup> As has been truly said, the objection of multifariousness is often taken but seldom sustained.<sup>7</sup> When certain very rudimentary conceptions of propriety are fulfilled, the sphere in which a bill becomes objectionable for multifariousness is a rather circumscribed one. It is only when the defect becomes so pronounced as to constitute an obstacle to the proper administration of justice that the courts are inclined to entertain it.<sup>8</sup>

*When Bill Not Multifarious—General Doctrine Illustrated.*

§ 405. Common Point of Litigation.

A bill is not necessarily rendered multifarious by reason of the fact that there may be united in it several causes of action. If all the different causes of action united in the bill grow out of the same transaction, and if all of the defendants are interested in the same rights, and the relief against each is of the same general character, the bill may be maintained.<sup>9</sup>

No bill is multifarious that presents a common point of litigation, the decision of which will affect the whole subject-matter, and will settle the rights of all the parties to the suit; and it is not indispensable that all the parties should have an interest in all the matters contained in the suit, but it is sufficient if each party has an interest in some material matters involved in the suit, and they are connected with the others.<sup>10</sup>

§ 406. Parties Having Common Interest.

If all the parties plaintiff to a suit have a common interest in the subject-matter of the litigation, it is not necessary that they should all be interested to the same extent.

<sup>6</sup> *Bracken v. Rosenthal* (1907) 151 Fed. 126.

<sup>7</sup> *United Cigarette etc. Co. v. Wright* (1904) 132 Fed. 197.

The author may be permitted to observe that practitioners generally are too much given to the habit of interposing frivolous demurrers raising the question of multifariousness. In one case that came under our notice, fifty-five demurrers are filed to one bill on this ground alone. See *Dennison Mfg. Co. v. Thomas Mfg. Co.* (1899) 94 Fed. 652.

<sup>8</sup> *De Hierapolls v. Lawrence* (1902) 115 Fed. 763.

<sup>9</sup> *Barcus v. Gates* (1898) 89 Fed. 791, 32 C. C. A. 345.

<sup>10</sup> *Brown v. Deposit Co.* (1888) 128 U. S. 403, 412, 32 L. ed. 468, 470, 9 Sup. Ct. 127; *Hayden v. Thompson* (1895) 38 U. S. App. 361, 17 C. C. A. 592, 71 Fed. 60; *Lewis v. Loper* (1891) 47 Fed. 259; *Prentice v. Storage Co.* (1893) 7 C. C. A. 293, 58 Fed. 437; *Curran v. Camplon* (1898) 29 C. C. A. 26, 85 Fed. 67, 70; *Burlington etc. Bank v. City of Clinton* (1891) 106 ed. 269; *Rogers v. Penobscot Min. Co.* (C. C. A., 1907) 83 C. C. A. 380, 154 Fed. 606.

1. *Shields v. Thomas* (1855) 18 How. 263, 15 L. ed. 368: A suit in chancery had been successfully litigated in the courts of Kentucky by certain heirs and distributees interested in an estate, and a decree had been entered in their favor for sums of money respectively due them from the administratrix and her husband. A bill was afterwards filed in the federal court by the same and other heirs and distributees of the estate to carry the decree of the Kentucky court into effect. It was held that notwithstanding the plaintiffs were severally interested to a different extent in the estate, the bill was not multifarious. The court observed that the subject of the suit was a title common to all the plaintiffs and was founded on their relation to a common ancestor, and it was added: "The different portions or shares into which the subject may be divisible amongst themselves can have no effect upon the nature or character of their title derived as above mentioned; and which in its character is an unit, and cannot be objected to for inconsistency or diversity of any kind. They seek an account and the recovery of a subject claimed by their common title, or an equivalent for that subject, against persons charged with having by fraudulent combination withheld and diverted that subject, and who, by such combination and diversion, rendered themselves equally, jointly, and severally liable therefor. Upon the face of this statement it would be consistent neither with justice nor convenience, nor consistent with the practice, to turn the appellees round to an action or actions at law, for any aliquot parts of each upon a division of this subject claimed under their common title, and which aliquot portions would have to be ascertained by an account which would not depend upon the question of liability of the defendants."

#### § 407. Existence of Numerous Conflicting Claims over One Matter.

Where the subject-matter of the controversy is encumbered with many conflicting claims, equity will entertain a suit for determining and adjusting all these interests at once. If the object of the suit be single, but it happens that different persons have separate interests in distinct questions that arise out of that single object, such persons should be brought before the court in order that the suit may conclude the whole object.<sup>11</sup>

1. *Grant v. Phania Ins. Co.* (1887) 121 U. S. 106, 30 L. ed. 905, 7 Sup. Ct. 841: The plaintiff was *cestui que trust*, either originally or by purchase, under twenty-six deeds of trust. These instruments had been executed by one Grant on real property. Some of the trust deeds covered only one lot, some embraced two or more lots, and one embraced all the property. There were five different sets of trustees. The object of the bill was to foreclose Grant's equity of redemption. It appeared that there were a number of judgment and mechanic liens affecting a number of the different lots, also that a number of purchasers from Grant were interested in parts of the property. It was held to be a situation where it was "eminently proper and indeed indispensable, if a clear title was to be given by a sale, to adjudicate all of the claims in one suit."

2. *Chase v. Cannon* (1891) 47 Fed. 674: A national bank hypothecated a num-

<sup>11</sup> *Salvidge v. Hyde* (1820) 5 Madd. 146; *Ryan v. Seaboard etc. R. Co.* (1896) 89 Fed. 397.

ber of notes with another bank to secure a loan. Subsequently the national bank became insolvent. Thereupon certain of its creditors, having recovered judgments against it, garnished the bank with which the notes had been hypothecated and sought to fix a lien thereon. A receiver was appointed for the defunct bank, and he then filed a bill against the bank holding the notes. In this bill he sought to recover possession of the notes, subject of course to the original debt for which they were hypothecated. The several judgment creditors were made parties, and the validity of their claim as lienholders under the garnishment was called in question. The situation was held to justify equitable intervention.

3. *Howe v. Haugan* (1904) 140 Fed. 182: The bill alleged a dominant ownership in the plaintiff of certain water rights derived by grant and contract from a water power company, also serious interference therewith by the defendant for which injunctive relief was sought. In addition to the water company itself, holders of its bonds were made parties defendant. The court observed that such bond holders were in the position of mortgagees and that inasmuch as the bill was in the nature of a suit to quiet title, rather than one for specific performance, such mortgagees were properly made parties.

#### § 408. Determination of Whole Controversy.

A court having jurisdiction for one purpose will proceed to determine the whole case, although some of the questions, if presented separately, would not furnish a basis for equitable relief.

1. *Pacific R. R. v. Atlantic & Pac. R. Co.* (1884) 20 Fed. 277: A railroad company leased its lines to another company for a long term of years. The lessee company defaulted, and a bill was filed by the lessor seeking an accounting in respect of the proceeds and application of certain bonds issued by the lessee, and also an accounting in respect of the damages suffered by the lessor from the failure of the lessee to keep down interest on mortgages covering some branch lines, which failure resulted in the foreclosure of those mortgages and the loss of the lines. It was held that the bill was not multifarious.

2. *United States v. Gugliard* (1897) 79 Fed. 21: The owner of land filed a bill to enjoin the unauthorized cutting of timber on his land by one G. He also sought an accounting for timber already cut. It was further alleged that certain other persons had received the timber cut from the land by G. These parties were made defendants and an accounting was asked against them as regarded the timber received by them. It was held that the bill was not multifarious.

#### § 409. Prayer for Incidental and Subordinate Relief.

A bill cannot be considered multifarious by reason of the fact that it asks for some additional relief incidental or contributory to the complete solution of the whole controversy and to the proper adjudication of the rights of the respective parties in regard to the principal subject-matter of the suit, there being no inconsistency between the different sorts of relief asked for.<sup>12</sup>

<sup>12</sup> *Olmsted v. City of Superior* (1907) 155 Fed. 173.

*Payne v. Hook* (1868) 7 Wall. 425, 19 L. ed. 260: A bill was filed by a distributee against a public administrator and the sureties on his official bond, seeking an account of the estate. Incidentally the plaintiff prayed that the accounts of the administrator in the probate court be opened and that a paper fraudulently obtained from the plaintiff by defendant, acknowledging the receipt of plaintiff's share in the estate, be canceled. It was held that the bill was not multifarious.

The joining of a prayer for the issuance of an injunction to restrain one of the defendants from prosecuting a suit at law will not render the bill multifarious, such relief being merely auxiliary to the main cause.<sup>13</sup>

#### § 410. Cause of Action on Ancillary Contract.

Where a bill is brought for an accounting under a contract, any cause of action arising out of a contract subordinate to and in furtherance of the main contract may be joined in the same bill, though the ancillary contract may appear to have been made with one not actually a party to the main contract, as for instance a guarantor of the performance of the main contract.

*O'Brien v. Champlain etc. Co.* (1901) 107 Fed. 338: A railroad construction company contracted to pay plaintiff a specified price per cubic yard for building an embankment. The estimates were made by the company's engineer. It was asserted that these estimates were fraudulent or mistaken and that the extent of the embankment was much greater than the estimates showed. As a result, the plaintiff was unable to complete the work within the stipulated time, and for this reason, so it was alleged, he was not allowed to finish it. An accounting was sought of the work done by the plaintiff, and damages, also for breach of the contract. In the same suit the person who had guaranteed the company's agreement to pay for the work was joined as a defendant, and as against him it was further alleged that in order to induce the contract he had himself contracted to pay an additional five cents per cubic yard. It was held that this inducing promise of the guarantor was ancillary to the main contract and that the bill was not rendered multifarious by reason of the insertion of such claim in the bill. It was said: "And the liability on the agreement for the five cents per cubic yard of rubble embankment is said to be purely at law, if anywhere. But this liability, if any, is for the same number of cubic yards of such embankment as the principal parties to the main contract may be liable for; and, if an accounting is necessary as to them, it is as to all, to ascertain the number of such yards. The making of the guarantors and these promisors parties to the bill for such an accounting does not produce multifariousness."

<sup>13</sup> *Equitable Life Soc. v. Patterson & Co., etc. Co. v. Champion Min. Co.* (1880) 1 Fed. 126; *Consolidated Wy.* (1894) 63 Fed. 540.

## § 411. Party Sued in Double Capacity.

A joinder of two causes of action against the same party for the same relief, one against him as an individual and one against him as an officer, does not make a bill multifarious.<sup>14</sup>

A bill brought to enforce a contract lien is not to be deemed multifarious by reason of the fact that it also seeks to enforce the personal liability of the individual whose indebtedness the lien secures.<sup>15</sup> But a plaintiff who files a bill on behalf of himself and other stockholders to wind up a loan association as insolvent cannot be permitted in the same suit to undertake to impeach his own debt to the association on the ground of fraud and usury.<sup>16</sup>

## § 412. Plaintiff Asserting Different Titles.

A person claiming the same property by different titles may assert all his titles in one bill.

1. *Halsey v. Goddard* (1898) 86 Fed. 25: The plaintiff asserted two titles to the land in controversy, viz., first as sole devisee; and, second, as sole heir at law. It was held that the bill was not multifarious.

2. *Stephens v. M'Carge* (1824) 9 Wheat. 502, 6 L. ed. 145: The plaintiffe sought to enjoin an adverse judgment at law and to vindicate their right to certain land which was the subject of the controversy. They claimed under two distinct titles, one derived from a pre-emption warrant and the other from a treasury warrant. The bill was held not to be multifarious. Said Marshall, C. J.: "It may be admitted, that two persons cannot unite two distinct titles in an original bill, although against the same person. Such a proceeding, if allowed, might be extended indefinitely, and might give such a complexity to chancery proceedings as would render them almost interminable. But we know of no principle which shall prevent a person claiming the same property by different titles, from asserting all his titles in the same bill."

3. *Kilgore v. Norman* (1902) 119 Fed. 1006: This was a proceeding instituted by the heirs of a husband and wife to recover lands, the title to which was, as to part, in the husband, as to part, in the wife, and as to part, in both husband and wife. Said Speer, Circuit Judge: "There is nothing multifarious in a title devolved through the law of inheritance when the title is vested in one or the other or both of the parents of the person suing."

It was also held that the bill was not rendered multifarious by the fact that in their answer the defendants set up a number of different titles from different sources. It was observed: "It cannot, we think, be insisted, because an answer is multifarious, that the bill itself is obnoxious to that objection."<sup>17</sup>

<sup>14</sup> *Rogers v. Pemberton Mining Co.* (C. C. A.; 1905) 68 C. C. A. 327, 134 (C. C. A.; 1907) 83 C. C. A. 280, 154 Fed. 689. But see *Barcus v. Gates* Fed. 606. (C. C. A.; 1898) 32 C. C. A. 337, 90

<sup>15</sup> *Ingersoll v. Coram* (1903) 127 Fed. Fed. 783.

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<sup>17</sup> Compare *Kilgore v. Norman* (1902).

<sup>18</sup> *Emmons v. National etc. Ass'n* 119 Fed. 1606.



**§ 413. Plaintiffs Deriving Title from Common Source.**

Likewise several persons claiming property or rights under one title, or deriving interests from a common source, may unite in a single bill, though the extent of their several rights and interests is not exactly the same; and one or more parties may unite in one bill various causes of action against different parties where the respective titles or interests of the defendants are derived from a common source, or involve a common subject-matter. The fact that separate suits could be maintained by one plaintiff against several different parties supplies no reason why they should not all be joined in one suit, if the plaintiff prefers, provided the main question in controversy is the same as against each.

1. *Gaines v. Chew* (1844) 2 How. 619, 11 L. ed. 402: A bill was filed by Myra Clark Gaines claiming both as heir and devisee against the executors of a will made by her father in 1811. It was alleged that the proceedings under this will were invalid. The purpose of the bill was to reach and recover real estate which had been sold by the executors under that will at different times and to different parties. Those purchasers were joined as defendants. They had a common source of title but no common interest in their purchases. It was held that the bill was not rendered multifarious by the joining of these parties as defendants, for the reason that the main ground of the defense, namely, the validity of the will of 1811, was common to all the defendants. There could be no doubt that the plaintiff might have maintained separate suits against each of these defendants, but this was not conclusive against her right to join them all in one.

2. *Oliver v. Piatt* (1845) 3 How. 333, 11 L. ed. 622: The point of criticism was that the bill, which was filed to subject property, united the claims of two different proprietors. Said Mr. Justice Story: "We are of opinion that the bill is in no just sense multifarious. It is true that it embraces the claims of both the companies; but their interests are so mixed up in all these transactions, that entire justice could scarcely be done, at least not conveniently done, without a union of the proprietors of both companies; and if they had not been joined, the bill would have been open to the opposite objection that all the proper parties were not before the court, so as to enable it to make a final and conclusive decree touching all their interests, several as well as joint." His honor then proceeded to quote with approval language of Lord Cottenham to the effect that it is impracticable to lay down any rule, as to what constitutes multifariousness, as an abstract proposition; that each case must depend upon its own circumstances; and much must necessarily be left, where the authorities leave it, to the sound discretion of the court.

3. *Ulman v. Jaeger* (1895) 67 Fed. 980: A bill was filed by one who claimed to be the owner of an undivided half interest in land, asking that his title be quieted by the annulment of tax deeds which had been executed by the tax commissioner to sundry persons purchasing different portions of the land at tax sales. The bill also asked for a partition sale. It was held that the bill was not multifarious either as to parties or subject-matter. Said the court: "If we hold that actions of law should be brought for the recovery of the lands sold

at the tax sale, it would involve the bringing of suits against each one of the defendants; or, if they were all impleaded in one action of ejectment, each one could demand a separate trial, which would occasion unusual delay, and greatly increase the cost of litigation. The purpose and object of this suit in impleading so many in one action is to prevent oppressive and vexatious litigation, which is not only unnecessary, but is often unavailing, as it might prove to be in this case."

4. *Hartford Fire Ins. Co. v. Bonner etc. Co.* (1890) 11 L.R.A. 623, 44 Fed. 151 (1898) 56 Fed. 378, 5 C. C. A. 524: A fire having occurred, arbitration proceedings were had to adjust the loss as against the several insurance companies which had issued policies on the property. The award was made, and the companies then filed a bill to set that award aside for misconduct of the arbitrators. In response to the objection of multifariousness in this bill, it was said: "The award in the case was the result of a joint submission made by all the plaintiffs in company with other insurance companies and defendant. The award is one instrument. Each of the plaintiffs is interested in the award, and is interested in the question of its cancellation. Hence I think the bill cannot be said to be multifarious. The plaintiffs have a common interest in the suit."

5. *Northern Pac. R. Co. v. Walker* (1891) 47 Fed. 681: A railroad company filed a bill against the tax collectors of twelve counties to enjoin the collection of taxes levied in their respective counties on lands therein situated. The taxes were levied for the same year and under the authority of the same law. The bill was held not to be multifarious. "The defendant's claims not only rest on the same law and facts but arose at the same time and from the same source."<sup>18</sup>

6. *Allen v. Fairbanks* (1891) 45 Fed. 445: A number of stockholders in a corporation were severally compellable under a state law to make payments on the debts of the corporation, their liability having arisen from the fact that they held unpaid stock. They all joined in a bill to force another stockholder, subject to the same liability, to make contribution. It was held that the bill was not multifarious though the claim of each orator was different from that of the others.

#### § 414. Latitude Allowable in Suits Based on Fraud.

Fraud is a head under which the courts may well permit some laxity of practice in regard to the joining of separate causes of action. By reason of its possible ramification through many different transactions and by reason of the fact that bills to relieve against fraud often charge collusion and concealment, there seems to be really no situation where the courts would ever hold a bill to relieve against fraud to be multifarious, provided only the rights of the parties can be settled and the causes joined can be determined with convenience and propriety in one suit.<sup>19</sup> A bill may be filed against several persons relative to matters of the same nature forming a connected series of acts all intended to defraud and injure the plaintiffs and in which all the

<sup>18</sup> This case was reversed (but on the point of jurisdiction only) in (1893) (1892) 13 Fed. 65. 148 U. S. 391, 37 L. ed. 494.

<sup>19</sup> See generally *Duff v. First Bank*

defendants were more or less concerned, though not jointly in each act nor to the same degree.<sup>20</sup>

1. *Williams v. Crobb* (C. C. A.; 1902) 50 L.R.A. 425, 54 C. C. A. 213, 117 Fed. 198: A bill was filed to set aside a will for fraud and undue influence, and also to set aside and cancel a deed of real estate on like ground of fraud and undue influence. The purpose of the suit was to recover from the defendant a half interest in certain real estate held by him under the will and deed in question and to set those instruments aside as a cloud on the plaintiff's title. Both causes of action were of an equitable nature, both grew out of the same transaction and subject-matter, and both depended largely on the same proof and circumstances. It was held that the bill was not multifarious, there being nothing to show that any of the defendants could be prejudiced by joining the two causes of action in one.<sup>21</sup>

2. *Fidelity & Deposit Co. v. Deposit Trust Co.* (1906) 143 Fed. 152: The Order of Chosen Friends had, among others, two depositaries, to wit, the Essex Bank and the Fidelity Trust Company. Its moneys were deposited in these to different accounts and were paid out on checks drawn in a specified form. The supreme treasurer of the order embezzled its funds by first establishing a new account in the trust company in his name as supreme treasurer and afterwards transferring the money deposited to this account to an individual account in the Essex Bank. The treasurer's surety paid the amount of the defalcation and became assignee of such right of action as the Order of Chosen Friends had, or was supposed to have, against the trust company and bank by reason of their negligence or complicity in suffering the funds to be diverted to the personal use of the defaulter. The surety then filed a bill against both the trust company and bank and sought to recover moneys for which they were alleged to be jointly liable by reason of their negligence and complicity. In the same bill the plaintiff sought to hold the trust company separately liable for other moneys wrongfully misappropriated and paid out by the defaulting treasurer. It was objected that the bill was multifarious, but it was held not so. In discussing this question, Cross, J., after stating the general principle that a bill will not be held multifarious merely because persons having no immediate connection with each other as regards a particular claim are joined as defendants, if the cause of action is the same against each and the joinder will save a multiplicity of suits and promote the convenience of the court and of the parties, said: "The complainant is interested in the alleged illegal transactions, and in all of them, and they are all of the same character and grew out of the alleged fraud and embezzlement of the treasurer of the order by the manipulation of its deposits in and between the two corporate defendants. As to some of the matters involved, it is true the Fidelity Trust Company may be alone responsible, but as to others it is alleged that it and the demurrant participated in them, and that they are jointly liable therefor, and that their joint liability grew out of the same alleged unwarranted and improper use of illegal checks drawn by the treasurer of the order, and which were so drawn illegally and improperly by him to the knowledge of both

<sup>20</sup> This doctrine was formulated by Chancellor Kent in *Brinkerhoff v. Home Ins. Co.* (1822) 6 Johns. Ch. 139.

<sup>21</sup> See *Virginia-Carolina, etc. Co. v.* 113 Fed. 1.

the defendants. . . . It is further substantially charged in the bill that these illegal matters are so interwoven that it is necessary that an account be taken of all the different accounts of the order in the trust company and in the bank, in order to ascertain not only the rights of the complainant in the premises but also those of the defendants, as to each other and the complainant.<sup>30</sup>

A bill alleging a fraudulent conspiracy entered into for the purpose of defrauding the plaintiff by obtaining his lands for less than their value is not multifarious because relief is sought in respect of several distinct transactions, provided all those transactions are alleged to be the fruit of the one conspiracy.<sup>31</sup>

*Kelley v. Boettcher* (1898) 29 C. C. A. 14, 85 Fed. 85: A bill was filed seeking, chiefly, the cancellation of a deed which, the plaintiff alleged, had been obtained by fraud. Among parties joined as defendants were, first, the company which had become the operator of a mine on the property in question; secondly, several individuals in whose interest the deed had been originally procured. As against the company the bill sought an accounting for the proceeds of the mine subsequent to the incorporation of the company, and as against the individual defendants it sought an accounting for the proceeds prior to the incorporation of the company. The bill alleged that all the individual defendants joined in employing a common agent upon whose false representations and concealments the deed was executed. It was held that the bill was not multifarious.

#### § 415. Latitude Allowable in Creditors' Suits.

Great liberality as to the joining of different claims in one bill is likewise indulged in creditors' suits. Thus if a failing debtor transfers part of his assets to A, B, and C, separately, all of those transactions can be brought into one creditor's suit, and all the assets can thus be recovered and applied to his debts in one proceeding.<sup>32</sup> A court of equity will not dismiss a creditors' suit for multifariousness of subject-matter or parties unless the defect is quite radical. There must be something wholly inconsistent and incongruous in the bill.<sup>34</sup>

#### § 416. Allegation of Conspiracy to Defraud.

The propriety of joining separate claims in such a suit is often put beyond question by alleging in the bill that each and all of the trans-

<sup>30</sup> *Northern Pac. R. Co. v. Kindred* (1881) 14 Fed. 77.

<sup>31</sup> *Johnson v. Powers* (1882) 18 Fed. 315; *First Nat. Bank v. Moore* (1892) 48 Fed. 709.

*Central Nat. Bank v. Fitzgerald* (1899) 94 Fed. 16, is out of harmony with the prevailing liberal practice in regard to the joining of independent claims in a creditors' bill.

<sup>32</sup> *Horner-Gaylord Co. v. Miller* (1906) 147 Fed. 295; *Jahn v. Champagne Lumber Co.* (1906) 147 Fed. 631.

actions in question were part and parcel of one fraudulent scheme to put the debtor's property beyond the reach of his creditors. This brings the case within the application of the general rule, noted above, in regard to the joining of different but related causes of action arising out of fraudulent conspiracies. This allegation is to a great extent merely formal, and the omission of it will not affect the bill so as to render it multifarious.<sup>25</sup> The fact that the property alleged to have been fraudulently conveyed to the several purchasers is all alike applicable to the debts of the transferer gives the necessary unity to the whole proceeding and prevents the suit from being multifarious.

1. *Brinkerhoff v. Brown* (1822) 6 Johns. Ch. 139: This case has long been regarded a leading one on this subject. The bill there was filed by several judgment creditors, claiming by several and distinct judgments, who sought the aid of a court of equity to render their judgments available against alleged fraudulent acts of the judgment debtor, equally affecting them all. The learned Chancellor Kent held that the bill was not demurrable for multifariousness, as there was a community of interest among the plaintiffs in the common objects of the suit. "There is no sound reason," said he, "for requiring the judgment creditors to separate in their suits, when they have one common object in view, which, in fact, governs the whole case. There is no particular matter in litigation peculiar to each plaintiff, and if they were obliged to sue separately, it may be pertinently asked, *qui bono*? Their rights are already established, and the subject in dispute may be said to be joint as between the plaintiffs, on the one hand, and the defendants, on the other, charged with a combination to delay, hinder, and defraud their creditors. If each creditor was to be obliged to file his separate bill, it would be bringing the same subject of fraud into repeated discussion, which would exhaust the fund, and be productive of all the mischief and oppression attending a multiplicity of suits."

2. *Hornor-Gaylord Co. v. Miller* (1906) 147 Fed. 295: A partnership having become insolvent, its creditors filed a petition of involuntary bankruptcy against it. At the same time, a bill in equity, in aid of the bankruptcy proceedings, was filed by the creditors against the partners and against several other individuals who were alleged to be fraudulent vendees of different items of property belonging to the partnership. In this suit the plaintiffs sought to reach the property alleged to have been fraudulently conveyed. The bill also asked for the appointment of a special receiver and for a temporary injunction. It was objected that the bill was multifarious as joining independent claims against different fraudulent purchasers. The contention was overruled. The court observed that the purpose of the suit was to subject the property of the bankrupt partners to the payment of their debts and added: "It is one subject-matter, and it is immaterial how many different claimants may arise for it as a whole or to parts of it. The several interests of each can well be determined in the one controversy."

3. *Sheldon v. Keokuk etc. Co.* (1881) 8 Fed. 769: A bill was filed by several judgment creditors of an insolvent corporation. It was alleged that all the

<sup>25</sup> *Pullman v. Stebbins* (1892) 51 Fed. 10; *Prevost v. Gorrell* (1879) Fed. Cas. No. 11,405.

property of such debtor had been withdrawn from the reach of the creditors through fraudulent transfers made to certain defendants. The transfers to these different parties were accomplished by different acts, but all were alleged to be part of one general scheme, shared in by those parties, though in different degrees. In overruling the objection of multifariousness, Justice Harlan said: "The court must necessarily exercise a large, though, of course, a sound discretion in allowing the union in the same suit of matters which do not alike or equally affect all the parties. Each case must depend upon its special circumstances, and the necessities which may arise out of the due administration of justice in that case. As a general rule, the court will not compel parties to incur the expense, vexation, and delay of several suits, where the transactions constituting the subject of the litigation, or out of which the litigation arises, are so connected by their circumstances as to render it proper and convenient that they should be examined in the same suit, and full relief given by one comprehensive decree. A different rule would often prove to be both oppressive and mischievous, and could result in no possible benefit to any litigant, whose object was not simply to harass his adversary, but to ascertain what were his just legal rights. As to the general propositions there can be no doubt under the authorities."

4. *Jahn v. Champagne Lumber Co.* (1906) 147 Fed. 631, 633: A suit in the nature of a creditors' bill was filed by a plaintiff on behalf of himself and other creditors against a corporation and its stockholders. The bill alleged that property of the corporation had been fraudulently transferred to the stockholders, and that the corporation had been thereby rendered insolvent. A discovery and an accounting were sought as against the corporation, and it was further prayed that, in the event sufficient property of the corporation could not be reached to satisfy plaintiff's debts, then the individual stockholders should be required to make sufficient payments on their stock subscription to satisfy the claim sued on. It was held that the bill was not multifarious. The court said: "The contractual obligation of the individual defendants to the corporation upon the stock subscription is a part of the assets of the corporation, and for the purpose of such a proceeding as this, stands upon the same footing as the tangible assets alleged to have been fraudulently appropriated. . . . According to the rules of equity, there is no fundamental difference between moneys that have been paid into the corporation and transformed into lumber and various other articles of personal property, and an obligation of individual stockholders to pay in other moneys for the purposes of the corporation whenever called in."

#### § 417. Creditors' Bill Multifarious if Inconsistent Relief Prayed.

A creditors' bill will be held multifarious if, in addition to seeking the relief which is appropriate to a creditors' suit, it also asks for other inconsistent relief. The liberality of practice in regard to the joining of diverse claims in such a suit contemplates the joining of claims against the different parties who have shared in the illegal transfers.

1. *Walker v. Powers* (1881) 104 U. S. 245, 26 L. ed. 729: One of the plaintiffs in a creditors' bill sought relief against certain fraudulent proceedings whereby

property had been withdrawn from the creditors. The plaintiff's right to relief in this respect was based on a judgment previously obtained by him against the debtor. But it appeared that this judgment had been satisfied by reason of the fact that the plaintiff had purchased land at a sale under an execution issued on that judgment. Furthermore, the plaintiff was now insisting that he had acquired the full legal title to the land bought at the execution sale, and sought to have his title thereto quieted. It was held that the latter relief was antagonistic to and inconsistent with that which was sought in common with the other creditors in respect of the property which had been fraudulently dealt with, for in the latter case the judgment was assumed to be unsatisfied and in the other it was assumed to be satisfied.

2. *Merriman v. Chicago etc. R. Co.* (1884; C. C. A.) 12 C. C. A. 275, 64 Fed. 535: A bill, when viewed as a creditors' bill, stated a good cause to redeem and take from the Eastern Illinois Railroad Company all the property obtained by it from the Danville company through the foreclosure of certain mortgages and trust deeds. The bill also stated a cause of action to acquire and appropriate bonds issued, or about to be issued, by the Eastern Illinois Railroad Company to secure and confirm its title to the property so sought to be taken from it. The court said: "The bill states two independent causes of action; and the right to recover upon one theory is destructive of the right to recover upon the other."

3. *Hudson v. Wood* (1903) 119 Fed. 764: A creditors' bill sought a discovery of assets from the judgment debtors, a personal judgment against the defendant B. on a money demand alleged to be due from him to the judgment debtors, and a decree to the effect that a certain pretense on the part of said B. (namely, that his indebtedness was to the corporation defendant and not to the judgment debtors) was fraudulent. On objection for multifariousness it was held the bill was good in so far as it sought from B. a discovery of the assets of the judgment debtors and the application of such assets to the plaintiff's demand; but that it was bad in so far as it sought to have a decree that the debt of B. was owing to the judgment debtor and not to the corporation as was claimed by B.

#### § 418. Bill to Enjoin Nuisance and Test Water Rights.

In nuisance cases and suits to test water rights there is also found, as in creditors' suits and in bills based on fraudulent conspiracies, a considerable latitude in regard to the parties who may properly be joined as defendants.

1. *Debris Case* (1883) 16 Fed. 25: This was a bill against a number of hydraulic mining companies, severally owning mines at various points on the Yuba river and its tributaries, and working them independently of each other to restrain them from discharging the gravel, waste earth, and mining debris arising from working their several mines into the streams. The plaintiff was the owner of land on the Yuba river which was alleged to be greatly injured by deposits of debris from the mines in question. In overruling an objection based on the alleged multifariousness of the bill, Sawyer, J., said: "It is true that each defendant is independently working its own mines without any conspiracy or preconcert of understanding or action with the others; but they all pour

their mining debris into the several streams, which they know must, by the force of the currents, be carried down into the main river, where they must commingle into one indistinguishable mass long before they reach the point where the nuisances complained of are committed and the damages are created. This commingling of the debris discharged into the various streams by the several defendants, and passing on to work the destruction alleged . . . is the necessary and natural consequence of the action of the several defendants; and they must, respectively, be presumed to know and to contemplate these natural and known physically necessary results. The nuisance is created by the joint action of the debris from the various mines, which is combined, and afterwards flows on together long before it reaches the lands injured and threatened, and after such combination creates the nuisance complained of. There is, therefore, a co-operation in fact, if not in intent, of these several defendants in the production of the nuisance. The injury is the joint effect of acts originally several, but combined before the debris is precipitated upon the lands below and the injury is effected, and in contemplation of equity it constitutes a single cause of action. There is a common interest in the right claimed to discharge debris into the streams. The defendants each and all claim a common, though not a joint, right. The final injury is a single one . . . and all the defendants co-operate in fact in producing it."

2. *Pacific etc. Co. v. Hawley* (1899) 98 Fed. 327: A riparian proprietor brought suit to enjoin the diversion of the waters of a river. Several different persons who were separately engaged in using and diverting those waters were made defendants. This was ruled to be proper. Said the court: "If the cause of suit is entire in itself and the relief sought does not consist in separate unconnected things, all the defendants connected therewith, and to be affected thereby, may be brought into one suit; and it is not necessary that the interest of each defendant shall extend to the whole subject-matter of litigation. The cause of suit presented in the present bill is single, so far as it affects the complainant. The complainant sues to restrain the diversion of the water of a certain stream. It brings into the suit as defendants all those against whom it seeks relief. The point of common interest between the complainant and the defendants is the water of the river." 28

3. *Rincon etc. Co. v. Anaheim etc. Co.* (1902) 115 Fed. 543: The plaintiff, a riparian proprietor, alleged ownership of a tract of land irrigable from the Santa Ana river. His bill was filed against other proprietors who, by virtue of an alleged appropriation, claimed the right to use all the water of the stream. The bill sought an adjudication of plaintiff's right to irrigate from that stream and an injunction restraining the defendants from taking water from it in excess of a certain amount. The plaintiff also sought a decree declaring his right in respect to the use of percolating waters. It was held that the bill was not multifarious, for the reason that it appeared that all of the defendant's rights and claims in the water pertained to and affected the plaintiff's land.

28 *Accord*, *Mining Co. v. Dangberg* Colo. 448, 30 Pac. 335; *Henshaw v. (C. C. A.; 1897)* 81 Fed. 73; *Hillman Canal* (1898) 6 Ariz. 151, 54 Pac. 577; *s. Newington* (1880) 57 Cal. 56; *Miller Larimer & Weld Reservoir Co. v. Water v. Ditch Co.* (1891) 87 Cal. 430, 25 Pac. 550; *Blaisdell v. Stephens* (1879) 14 App. 225, 42 Pac. 1020, Nev. 17; *Saint v. Guerrero* (1892) 17 Eq. Prac. Vol. I.—17,



### § 419. Suits for Infringement of Patents.

Causes of action arising from the infringement of different patents can be united in one suit where it appears that the patents have a relation to each other and the alleged infringement appears to have taken place in the manufacture by defendants of a particular type of apparatus. Especially is this permissible where to require different suits would greatly enhance the cost of the proceedings and serve no useful purpose.<sup>37</sup>

*United States v. Bell Telephone Co.* (1898) 128 U. S. 315, 32 L. ed. 450: A bill was filed by the United States to obtain the repeal and vacation of two different patents held by the American Bell Telephone Company. The two patents were issued nearly a year apart, but they were issued to the same individual and both related to the same subject, to wit, the communication of messages at a distance by telephonic speech. Both patents were based on the same general method, and the later patent represented a supposed improvement on the earlier one. Both were used by the defendant company in the same operations. It was held that the bill was not multifarious in respect of subject matter. Said Mr. Justice Miller: "The Bell Telephone Company and Mr. Bell himself are the only parties defendant, and their interest in sustaining the patents is the same. So also there is no such diversity of the subject matter embraced in the assault on the two patents that they cannot be conveniently considered together, and although it may be possible that one patent may be sustained and the other may not, yet it is competent for the court to make a decree in conformity with such finding. It seems to us in every way appropriate that the question of the validity of the two patents should be considered together."

### § 420. Conjoint Use of Different Patents.

As a general rule, in order to proceed in one suit for the infringement of different patents, the plaintiff must be able to allege, and the bill must allege, that the patents are conjointly used, or are capable of conjoint use.<sup>38</sup>

*Daimler Mfg. Co. v. Conklin* (1906) 145 Fed. 955: The plaintiff was owner of four patents covering different parts of the same machine. The defendant having infringed, a single bill was filed seeking to enjoin the infringement of those four patents. The parts covered by the patents were only capable of conjoint use in connection with the entire machine. It was held that the bill was not multifarious as combining independent causes of action on different patents; and furthermore it was held that the allegation that they were combined in one machine was a sufficient allegation that the patents were capable of conjoint use.

<sup>37</sup> *Animarium Co. v. Neiman* (1899) Co. (1884) 20 Fed. 502; *Union etc. Co.* 98 Fed. 14.

<sup>38</sup> *Hayes v. Dayton* (1890) 8 Fed. 702; *Diamond Match Co. v. Ohio Match Co.* *Barney v. Peck* (1893) 16 Fed. 413; (1897) 80 Fed. 117; *Louden etc. Co. v. Consolidated etc. Co. v. Brush-Swan, etc. Montgomery* (1899) 96 Fed. 232.

### § 421. Patents Pertaining to Single Subject.

But this rule is not inflexible, and a bill for the infringement of separate patents has been sustained though the allegation of conjoint use was not made. In a case where this was done the patents pertained to a single subject,—the production of mineral wool by the remelting of hardened slag in a cupola,—and differed only as to one ingredient employed in melting the slag. The court observed that the inquiry of fact was quite well defined and that no confusion or hardship could arise in presenting the issues in one suit. The demurrer raising the question of multifariousness was accordingly overruled.<sup>29</sup>

### § 422. Suits for Infringing Trademark.

A cause of action for the infringement of a trademark may be joined in the same bill with a cause of action for the infringement of a patent, provided the infringement of the plaintiff's trademark is done in marketing the same article that embodies the alleged infringement of his patent.<sup>30</sup>

### § 423. Infringement of Copyrights.

The same liberality as regards the joining of different causes of action which is indulged in regard to the infringement of patents also prevails in suits concerning the infringement of copyrights. If one work protected by a single copyright is infringed by the publication of several different works by the same defendant, the person whose copyright is infringed may proceed against that defendant in one suit for all the infringements; and, conversely, if many different copyrights vested in a single plaintiff are violated by one defendant in one publication or series of publications, all the acts of infringement may be joined in one bill. The chief limitation to this practice is found in the consideration of convenience.<sup>31</sup>

*Empire City Amusement Co. v. Wilton* (1903) 134 Fed. 132: A bill was filed to enjoin the infringement of copyright in two different dramatic compositions, the right to each of which was vested in the plaintiff. The infringement in question was alleged to consist in the production by the defendant of a certain

<sup>29</sup> *United States etc. Co. v. Manville etc. Co.* (1900) 101 Fed. 145.

<sup>30</sup> *Animarium Co. v. Neiman* (1899) 98 Fed. 14.

<sup>31</sup> *Bracken v. Rosenthal* (1907) 151 Fed. 138.

The infringement of many separate copyrights which cover matter forming a complete index system may be made subject of a single bill. *Amberg File, etc. Co. v. Shea* (1896) 78 Fed. 479; (1897) 27 C. C. A. 246, 82 Fed. 314.

play. Upon the objection being raised that the bill was multifarious, Lowell, J., observed: "Considering the connection between the two, I think it is within the discretion of the court to permit these two matters of complaint to be joined in one action. That it is convenient for the court that they be joined I have no doubt."

#### § 424. Trademark and Copyright Causes Combined.

A cause of action for the infringement of a trademark and for the infringement of different copyrights can be united in the same bill where the wrong complained of as supplying the different grounds of action consists of the publication of a single book.<sup>22</sup>

#### § 425. Prevention of Multiplicity of Suits.

A bill is not multifarious when the different matters and causes of action stated in the bill are of such nature as to give rise to the independent equitable jurisdiction indicated under the head "prevention of a multiplicity of suits." In every case cognizable on this ground the court permits the uniting of different grounds of action and the joinder of parties whose interests are not identical. In other words, multifariousness is held not to be a valid objection where, by taking jurisdiction, the court of equity may properly and conveniently, under its particular procedure, administer full relief and thereby prevent a multiplicity of suits. Now, just as there is no general principle by which to determine the question of multifariousness, so "there is no hard and fast rule for the determination of cases coming under the general doctrine of avoidance of a multiplicity of suits."<sup>23</sup> Each case must be determined very much on its own peculiar state of facts. It may be noted that courts are by no means in harmony on the point as to when the equitable power of entertaining a bill in order to prevent multiplicity of actions should be exercised, and we do not propose to attempt to analyze the cases on this question. It is enough to know that wherever a court can be prevailed upon to exercise this power, the objection to the bill in respect to its multifariousness fails. A few statements accompanied by illustrations from the cases will be sufficient to indicate the general application of the idea as regards the question of practice.

#### § 426. Number of Persons Having Separate Connected Claims.

A court of equity will, in a single suit, take cognizance of a controversy, determine the rights of all the parties, and grant the relief

<sup>22</sup> *Harper v. Holman* (1897) 84 Fed. 222.

<sup>23</sup> *Pere Marquette R. Co. v. Bradford* (1900) 149 Fed. 492, 499.

requisite to meet the ends of justice in order to prevent a multiplicity of suits, where a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter may be conveniently settled in one action brought by all these persons uniting as co-plaintiffs.<sup>34</sup>

A suit cannot be maintained in equity on the ground of preventing a multiplicity of suits where the demands against each of the defendants, though of the same nature, are entirely distinct and unconnected with those against the other defendants. In such case each defendant can object to the joining of any distinct and unconnected causes of action.<sup>35</sup>

#### § 427. Consideration of Convenience as Affecting This Question.

The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than would be compensated for by the convenience of a single plaintiff, and where the case is not covered by any controlling precedent the inconvenience might constitute good ground for denying jurisdiction.<sup>36</sup>

#### § 428. Joinder of Different Equitable Causes.

Where the multitude of actions which equity undertakes to avoid are of an equitable nature and the court of equity has inherent jurisdiction to entertain each of them if they were brought separately, the principle governing the right to join the several different causes of action is correctly stated in the following proposition, to wit: The sole owner or several owners of different claims and rights of action against one party, or the sole owner or several owners of different claims and rights of action against different parties, may maintain a single suit where all the claims and rights of action arise from a

<sup>34</sup> *Liverpool etc. Ina. Co. v. Clunie* 819, 18 Sup. Ct. 418; *Western Land, etc.* (1898) 88 Fed. 160, 167; *Libby v. Norris* (1896) 142 Mass. 248, 7 N. E. 919; *Hale v. Allinson* (1903) 188 U. S. 523. <sup>35</sup> *Osborne v. Railroad Co.* (1890) 43 Fed. 56, 47 L. ed. 380; *City of London v. Perkins* (1734) 3 Bro. P. C. 602; *Mayor Ga. 1, 11 S. E. 442*; *Sang Lung v. Jackson* (1898) 85 Fed. 502, 504; *Smyth v. Allinson* (1903) 188 U. S. 406, 42 L. ed. 77, 78, 47 L. ed. 392, 393. <sup>36</sup>

common cause, are governed by the same legal rule, and involve similar facts, and where it further appears that the whole matter may be conveniently settled in a single suit. In this class of cases the right to join the several causes of action is due to the common point in controversy or the common interest at stake, which common point or interest will be determined by the litigation. Even the existence of a common issue which will be fully determinative of all the controversies is sometimes enough.<sup>37</sup>

1. *United States v. Curtner* (1886) 20 Fed. 296: The United States had by mistake issued listings of lands in California to that state, and that state had thereafter issued patents to these lands to sundry persons. The United States subsequently filed a bill to set aside the listings to California. The different grantees under the patents from California were made defendants. It was held that they could all be sued in one suit as thereby the bringing of many separate suits in equity was avoided. The question was in issue and the same proof available as against each. The fact that they had separate patents and that neither defendant had any interest in the patents of the other defendants was held not to be fatal to the right to join all in one suit.

2. *United States v. Flournoy etc. Co.* (1895) 69 Fed. 686: A bill was exhibited by the United States in its capacity as trustee for certain Indians to vacate leases which had been unlawfully obtained by different persons from different lessors, purporting to give rights to lands formerly held in common by the tribe but now allotted in severalty. It was said that there was a common interest and a common question and that therefore the bill was not multifarious. It might have been said that there was a common interest in a common question and that this was enough.

3. *Dastervoignes v. United States* (1903) 58 C. C. A. 346, 122 Fed. 30: Where a bill is filed against several defendants to enjoin trespasses on a government reservation by the pasturing of sheep thereon, the bill is not demurrable for multifariousness where it appears that the trespasses committed by each of them are the same, that the same legal principles are applicable to all the acts complained of, and that the relief sought against each is the same; especially is this true where, so far as appears from the bill, the defendants are acting in common under the same claim of right and have a common interest touching the matters alleged in the bill.

<sup>37</sup> *Osborne v. Railroad Co.* (1890) 43 Fed. 824; *Kelley v. Boettcher* (1898) 85 Fed. 55, 64; *Hayden v. Thompson* (1895) 17 C. C. A. 592, 71 Fed. 60, 67; *Chaffin v. Hull* (1899) 39 Fed. 887; *Prentice v. Forwarding Co.* (1893) 7 C. C. A. 293, 58 Fed. 437; *Brown v. Safe Deposit Co.* (1888) 128 U. S. 412, 32 L. ed. 470.

Where a tax is levied on bank stock in the hands of its holders and against such holders individually, and the bank itself is charged with no duty in respect of the payment of such tax, so that it can in no event be held liable therefor, such bank cannot maintain an injunction suit on behalf of such stockholders to enjoin the tax, the same being alleged to be illegal, although by permitting such suit at the instance of the bank, a multiplicity of suits would be avoided. But where, under the taxing statute, the bank is made indirectly liable for the tax, the bill may be maintained by it. *People's Nat. Bank v. Marye* (1901) 107 Fed. 570, (1903) 191 U. S. 272, 48 L. ed. 190.

A bill to restrain ticket brokers from unlawful traffic in limited return trip tickets is not made multifarious as to parties defendant by the joinder of several ticket brokers who are in no way associated in business with each other. It is enough that they are all engaged in the same sort of business and that the case is the same against each.<sup>28</sup>

*Illinois Cent. R. Co. v. Coffey* (1904) 128 Fed. 770: A railroad company engaged in the carrying of passengers filed a bill against many different individuals and firms of ticket brokers or "scalpers," each separately engaged in the buying and selling, in the city of St. Louis, of special excursion rate tickets. The same cause of action existed against each individual or firm, the same question was in issue as against each, and the trial of any one suit, if separate suits had been brought, would virtually have determined all. It was held that the bill should not be dismissed, though it was clearly multifarious in respect of joining the several separate parties. Said Thayer, Circuit Judge: "It is too plain for serious controversy that the convenience of all parties, including the defendants and the court in which the cases are pending, will be subserved by allowing the actions to proceed against the defendants collectively. Nor is it perceived that the substantial rights of any of the defendants will be jeopardized by so doing. It is not suggested that they have separate defenses to make, and, even if a separate defense does exist in favor of any defendant, it can be urged with the same facility and effect in the present suits as if such defendant was sued separately, and probably at less cost. . . . It may be conceded that persons ought not to be called upon to make a defense to actions against third parties, when the cause of action is one with which they have no concern, and where they are in the attitude of idle spectators of the controversy; but where the cause of action is one in which they have an immediate interest, because a like cause of action exists against themselves, to which they make the same defense as others will make, and by joining them with others the convenience of everybody, including the court, is subserved, and the rights of every one may be safeguarded and valuable time saved, no reason is perceived why they may not be joined, there being no hard and fast rule of law which forbids. Such is the case at bar. The defendants have a common interest in the questions to be litigated, and it is desirable that they should be heard and determined in a single trial."

#### § 429. Prevention of Multiplicity of Actions at Law.

Where all of the various causes of action are purely legal and equity has no jurisdiction of each of them separately, but its jurisdiction is founded exclusively on the existence of its power to prevent a multiplicity of actions, a somewhat stricter rule appears to be enforced than in those cases where the numerous different causes of action are of an equitable nature. Where all the causes of action are of an equitable nature the chief consideration is that of con-

<sup>28</sup> *Bitterman v. Louisville etc. R. Co. Pennsylvania Co. v. Bay* (1906) 150 Fed. (1907) 207 U. S. 205, 52 L. ed. 171; 770.

venience; where they are exclusively of a legal nature the court has to take notice of the general rule that equitable jurisdiction cannot be exercised, if the remedy at law can be considered adequate. Hence, from the mere fact that the maintaining of a single suit in equity would lessen the number of actions at law it does not necessarily follow that equity will entertain the bill. However, the circumstance that a party would be driven to numerous actions at law in order to get redress is itself a thing to be considered as persuasive that the legal remedy is inadequate.<sup>29</sup>

1. *Reine v. Levee Commissioners* (1873) 19 Wall. 656, 22 L. ed. 223: Several bondholders, whose bonds had been issued at the same time and under the same conditions by a board of levee commissioners, united in filing a bill in chancery to obtain a decree for the amount of the bonds and to compel a levy of taxes to satisfy the decree. It was held that the court of equity had no jurisdiction of the case unless there was some obstruction in the way of the common-law remedy. It was not suggested by court or counsel that because a suit in chancery would lessen the number of actions such a proceeding could for that reason alone be maintained though the bonds sued on originated in the same transaction and though the defenses were the same and the same questions of law were involved as to each.<sup>30</sup>

2. *Washington County v. Williams* (1901) 48 C. C. A. 621, 111 Fed. 601: A series of bonds were issued by a county payable to bearer. Each contained a promise by the county to pay, on the bonds, a sum annually to be raised by the levy of a tax of one mill on all property within the county subject to taxation, each bond being entitled to its own *pro rata*. The county having refused to recognize the validity of the bonds, a bill was filed by a number of the holders, the purpose being to obtain judicial recognition of the validity of the bonds and a judgment for the amounts severally due to the respective holders. In the circuit court of appeals, it was held by Caldwell and Thayer, JJ., that the plaintiffs had as good a remedy at law as in equity and that the case was not one to justify equitable intervention for the mere prevention of a multiplicity of suits. Said Thayer, Circuit Judge: "No reason is perceived why each holder of one or more of the obligations in suit may not sue at law, as one of them has already done, and obtain a judgment for the sum due to himself, by proving at the trial what sum would have been raised, and what part thereof would have been payable to him, had the tax been levied. Nor do we perceive that the remedy in equity is any more efficacious than at law. All that a court of equity can do is to determine the validity of the obligations, and render a money decree for the amount of the annual installments then due and unpaid. As much can be done by a court of law, and with equal facility. Moreover, after the validity of the obligations has been established, and a judgment obtained, resort must then be had to a legal remedy, to wit, a writ of mandamus, to compel the levy of a tax to pay the judgment, whether it be recovered at law or in equity, since it is

<sup>29</sup> 1 Pom. Eq. Jur. (2d ed.) § 243. *Board* (1896) 23 C. C. A. 236, 232, 77

<sup>30</sup> *Rees v. City of Watertown* (1873) Fed. 567.

19 Wall. 107, 22 L. ed. 72; *Stryker v.*

a well-settled doctrine in the federal courts that a court of equity cannot command the levy of a tax; that being a duty which the legislature must impose; the sole function of the courts being to enforce its performance by mandamus when it has been imposed."<sup>41</sup>

3. *Schulenberg-Boeckeler Co. v. Hayward* (1884) 20 Fed. 422: The fact that several taxpayers are adversely affected by the interpretation put upon the tax laws by local authorities, and the fact that such authorities have improperly levied taxes on property in transit and subject to interstate commerce, does not authorize the joining of those persons as in one suit to restrain the collection of the taxes, where each party has an adequate separate remedy by an action at law. Said the court: "Courts of equity cannot wrest jurisdiction from the courts of law because there is more than one plaintiff severally interested in the controversy; and many actions by different plaintiffs, where one action at law will settle the controversy as to each, is not what is intended by a multiplicity of suits. Here, no one of the plaintiffs would have any interest in any suit brought by another, and no one can complain because others are compelled to sue, inasmuch as he could not be called upon to share either in the vexation or expense. No one of the complainants stands in any danger of a multiplicity of suits affecting himself, and he cannot complain that some other person must have a suit in order to obtain that other person's legal rights."<sup>42</sup>

4. *Boyd v. Schneider* (C. C. A.; 1904) 85 C. C. A. 209, 131 Fed. 223: The bill was filed by a depositor of a national bank on behalf of himself and others who might join, against certain directors of the bank to recover losses incurred by the bank through the negligence and misconduct of those directors. Some of the wrongful acts complained of were alleged to have been done by the several directors at different times and while serving different terms. The obligations and liabilities of such defendant directors were therefore in part individual and in part joint. It was insisted that the bill was multifarious, but a demurrer raising the question was overruled. Said Grosscup, Circuit Judge: "It is a case not alone of a number of persons having separate and individual claims against one party, arising from a common cause; or one person having rights against a number of persons, arising from a common cause; but the case of a number of persons having each a right against a number of persons, all arising from a common cause. To this, too, must be added the further consideration, that neither of the depositors could by separate suits at law recover that to which he is entitled; for the defendants to such suits, being directors who served varying terms, and subject, therefore, to varying obligations, could not be called to complete accounting and apportionment in a suit at law. Our conclusion is that the bill filed is the proper way to obtain an enforcement of whatever rights the depositors individually, or as a class, may have against the directors individually, and as a class."

5. *City of Hutchinson v. Beckham* (1902) 55 C. C. A. 333, 118 Fed. 399: A bill of peace was filed by a wholesale jobber who maintained a storage warehouse in the city of Hutchinson to have an ordinance taxing his business declared void

<sup>41</sup> But in the same case Sanborn, Circuit Judge, dissented in an opinion of much cogency. *Washington Co. v. Williams* (1901) 49 C. C. A. 621, 111 Fed. 801, 817.

<sup>42</sup> *Cutting v. Gilbert* (1865) 5 Blatchf. 250; *Dodd v. City of Hartford* (1856) 25 Conn. 232; *Youghlood v. Sexton* (1875) 32 Mich. 406; *Barnes v. City of Beloit* (1866) 19 Wis. 93.



and to procure an injunction against the attempted enforcement thereof. The city authorities, for the purpose of enforcing compliance, had caused his agents to be arrested and were threatening to make further arrests and to institute numerous criminal proceedings and thereby prevent the plaintiff from receiving, storing, and speedily delivering his goods as had been his wont. It was held that equity had jurisdiction. If left to the remedy at law, the plaintiff would have sustained irreparable loss in business and would probably have been called upon to defend a multitude of suits.<sup>43</sup>

### § 430. Suit to Enjoin Actions at Law.

A bill to enjoin actions at law brought by different parties is not multifarious, where all the actions concern one and the same subject-matter. But if the actions at law embrace separate subjects the bill is multifarious, though the actions are all being prosecuted by one person and he is made sole defendant in the bill.

1. *South Penn Oil Co. v. Calf Creek etc. Co.* (1905) 140 Fed. 507: Two separate actions at law had been brought by different parties in a federal court to recover damages of the South Pennsylvania Oil Co., which damage, it was alleged, had been incurred by reason of said company having bored wells and removed oil from certain lands. The two different plaintiffs in these actions each claimed right in those premises as owner, but it appeared that their respective interests depended upon the construction of an oil and gas lease which was somewhat uncertain. The defense to the actions was also dependent upon the invocation of an equitable estoppel and upon the construction which might be given to the decree of a court in a previous action. The issues were otherwise somewhat complicated. The defendant in these actions thereupon filed its bill in equity to enjoin the prosecution of those suits and to establish its right in the premises. It was held that the facts of the case were such as to show that the plaintiff in the equity suit would have had great difficulty in making his defense in the court of law, that good reason for resort to equity was shown, and that the bill in question was properly filed.

2. *Virginia-Carolina etc. Co. v. Home Insurance Co.* (1902; C. C. A.) 51 C. C. A. 21, 113 Fed. 1: The Virginia-Carolina company brought separate actions at law against fourteen insurance companies, seeking to recover on policies of insurance issued by them respectively. All of the companies resisted the claims on the ground that the policies were procured by fraud, misrepresentation, and concealment of the true value of the property insured. A bill was filed in the equity side by two of the insurance companies against the Virginia-Carolina company and the several other insurance companies, defendants in the actions at law, seeking to enjoin these actions and to have the whole controversy determined in one suit. All the actions at law involved the same legal questions, all were founded on the same issues of fact, and the liability of the insurance companies was the same in each, the only difference being in the amounts involved in the

<sup>43</sup> *Ogden v. Armstrong* (1897) 168 U. Chicago (1870) 11 Wall. 108, 20 L. ed. S. 224, 42 L. ed. 444. Compare *Dows v. 66*.

different policies. If liability existed at all under the policies it was necessary that the same should be apportioned among the companies. It was held that the facts presented were sufficient to justify the court of equity in taking jurisdiction in order to prevent a multiplicity of suits and to protect the several companies from unnecessary expense.

3. *Sullivan Timber Co. v. Mobile* (1901) 110 Fed. 186: Two actions of ejectment were pending in the law side of the court against one defendant. Each was for the recovery of separate tracts, and each was held by the defendant under different and distinct titles. The defendant filed a bill to enjoin those suits, setting up good matter of equitable defense. On demurrer it was held that there was good equity in the bill but that it could not be sustained in the form it was in, because of multifariousness. The case was not one where the causes could be joined in order to prevent a multiplicity of suits.

### § 431. Suit by Receiver on Different Causes of Action.

Before the receiver of a corporation can maintain a single suit against numerous separate debtors of the corporation, there must be some common relation, or common interest, or common question, to serve as a basis for the joinder. Neither the similarity of the claims nor the fact that the receiver is collecting a common fund to be distributed by the court is sufficient to support the jurisdiction. For example, if the receiver of an insolvent bank should come into possession of fifty promissory notes; apparently due to the bank from as many separate debtors, he certainly could not join these defendants in one equitable proceeding, based upon all the notes, merely because fifty suits at law might thereby be avoided. Neither would a court of equity acquire jurisdiction in such a case upon the additional ground that the money, when collected, would become part of a fund that would be distributed under the court's control. The principles that might govern the distribution would not change the character of the various liabilities sought to be enforced by the bill, and the receiver would be obliged to sue at law upon the separate legal obligation created by each contract, although the money realized by the suits might be afterwards distributed by a court of equity in accordance with equitable principles.

1. *Kennedy v. Gibson* (1869) 8 Wall. 505, 19 L. ed. 478: The receiver of a national bank brought suit against stockholders to enforce the liability imposed on them by the national banking act. The bill prayed that an account be taken and that each of the defendants should be decreed to pay *pro rata* to the receiver so much as might be necessary to liquidate. It was said: "The liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one. Where the whole amount is sought to be recovered,

the proceeding must be at law. Where less is required the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution."<sup>44</sup>

2. *Tompkins v. Craig* (1899) 93 Fed. 885: The case being similar to the preceding one, the court said: "Each defendant may desire to set up a different defense. One stockholder may have paid his assessment in whole or in part; another may seek to raise the question whether the Iowa court had jurisdiction to make the levy; a third may wish to attack the amount of the assessment; another may aver that his subscription was void from the beginning; and still other defenses, which need not be specified, are readily conceivable. We say nothing about the validity of these defenses. Some of them may not be available, and others may not be successful; but each defendant has the right to make whatever objection he may see fit to raise, in order that it may be passed upon by the court. If the defendants are numerous, as they are in the pending suit, it would be almost, perhaps wholly, impossible to apportion fairly the costs of hearing and of determining many unrelated issues."

3. *Hayden v. Thompson* (1895) 17 C. C. A. 592, 71 Fed. 60: The receiver of a national bank filed a bill against its stockholders to recover dividends which had been improperly paid to them from the bank's capital during the insolvency of the bank. The dividends sought to be recovered had been paid at different times and in different amounts to different stockholders. The district court held that the bill was multifarious and could not be maintained, the idea being that inasmuch as each stockholder was liable only for the dividends paid to him, the claims against them represented distinct causes of action such as could not be joined in one suit. But this judgment was reversed in the circuit court of appeals. In this court Sanborn, Circuit Judge, said: "No bill is multifarious which presents a common point of litigation, the decision of which will affect the whole subject-matter, and will settle the rights of all the parties to the suit." Then after observing that the suit was brought to recover capital of the bank improperly paid out in dividends, his honor added: "Each of these defendants, by sharing the diverted fund which is the subject-matter of this suit, has connected the cause of action against him with that against every other defendant, and has become interested in the subject-matter of the suit itself, and in the vital issue in the case, whether the fund paid to the appellees was taken from the capital or from the profits of the bank. The objection that the bill is multifarious must be overruled."

### *When Bill Becomes Multifarious—General Doctrine Illustrated.*

#### § 432. The Multifarious Suit—Illustrations.

A bill will be considered multifarious if the distinct and separate claims made in it are so different in character that the court ought not to permit them to be litigated in one suit. Two or more distinct objects cannot be embraced in the bill; its double character destroys it. Where two essentially different causes of action are joined that

<sup>44</sup> This doctrine has been approved *linghast* (1900) 40 C. C. A. 93, 99 Fed. in many subsequent cases. *Casey v. 801*; *Hale v. Allinson* (1900) 102 Fed. *Galli* (1876) 94 U. S. 673, 24 L. ed. 168; 790. (1901) 45 C. C. A. 270, 106 Fed. *United States v. Knox* (1890) 102 U. 258 (1903) 188 U. S. 53, 47 L. ed. 390. S. 422, 26 L. ed. 216; *Bailey v. Til-*

present no common question for litigation and require different proof, the bill is properly treated as multifarious, and a demurrer thereto should be sustained. A bill is multifarious where the plaintiff asserts two mutually antagonistic claims to relief.<sup>43</sup>

1. *Security Savings & Loan Assn. v. Buchanan* (1895; C. C. A.) 14 C. C. A. 97, 66 Fed. 799: A non-resident building and loan association was inveigled into making a large loan on property of little or no value. The applicants for the loan grossly misrepresented the property and the local appraising board of the building and loan association also joined in this false representation. After advancing the money the association discovered the fraud and filed a bill seeking to recover the money from the borrowers, to foreclose the deed of trust given to secure it, to recover on a bond given by two of the company's own local appraisers to make sure the building of contemplated improvements on the property covered by the trust deed, also to recover of the local appraisers for their complicity in the fraud. Lastly, the bill sought, as preliminary to other relief, to have certain lost instruments set up. It was held that the bill was multifarious. Said the court: "Here are several independent causes of action, each of which is sufficient in itself to support a separate suit. Some of the defendants are concerned with some of the causes of action, and not with others, while others of the defendants are not concerned with those which involve the former. Besides this, as to some of the causes of action, the defendants therein are entitled to have the issues tried by a jury, of which right they would be deprived if the complainant were permitted to draw them all into a court of equity."<sup>44</sup>

2. *Emmons v. National etc. Assn.* (C. C. A.; 1905) 68 C. C. A. 327, 135 Fed. 689: A stockholder and borrower in a loan association filed a bill to cancel a deed of trust given on his property to secure a loan, and also to have an accounting. The bill alleged, among other things, that the defendant association was not entitled to do business in that state, that the deed of trust in question was obtained by fraud, and that the loan was infected with usury. It was also alleged that the officers of the association had misappropriated its funds and that it was insolvent. Upon this allegation, it was prayed that a receiver be appointed and the affairs of the association wound up. It was held that the bill combined antagonistic grounds of action and a general demurrer on the ground of multifariousness was sustained.

<sup>43</sup> *Leslie v. Leslie* (1897) 84 Fed. 70; bill contains different causes of suit against the same person, two things must concur: first, the grounds of suit must be different; second, each ground must be sufficient as stated to sustain a bill. *Brown v. Guarantee Trust Co.* (1888) 128 U. S. 403, 9 Sup. Ct. 127, C. A. 294, 121 Fed. 956; *Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co.* (1890) 43 Fed. 545, 548.

A bill for the perpetuation of testimony is multifarious if it also asks for relief. *Aetna Life Ins. Co. v. Smith* (1896) 73 Fed. 318.

To support an objection of multifariousness grounded on the fact that the

<sup>44</sup> *Campbell v. Mackay* (1836) 1 Myl. & C. 603; *Brown v. Deposit Co.* (1888) 128 U. S. 403, 32 L. ed. 468, 9 Sup. Ct. 127; *Newland v. Rogers* (1848) 3 Barb. Ch. 432; *Eastern etc. Assn. v. Denton* (1895) 13 C. C. A. 44, 65 Fed. 569; 1 Danell Ch. Prac. 335.

Said the court: "The effect of what the complainants seek to do in this case is, on the one hand, to have the defendant company declared an illegal corporation, doing business illegally without proper charter or by-laws, or with invalid by-laws; and as a consequence of which, and because of fraud in the inception of the contract with the complainants, to have their stock subscriptions treated as null and void, their debt as usurious, and the lien securing the same canceled. On the other hand, they ask to be treated as shareholders in such illegal corporation; to be made subject to its alleged invalid by-laws, and to be entitled to its benefits; with the right to have the association's officers account and to be held liable thereunder; and that the court will, through its receiver, proceed to administer the affairs of such corporation, to carry out the purposes of the corporation, and enforce the provisions of such by-laws. These positions are not only inconsistent, but plainly hostile. The complainants may be entitled to rights in each capacity, but they should not be allowed to pursue them in the same suit."<sup>47</sup>

3. *Chapin v. Sears* (1883) 18 Fed. 814: The bill was filed for two objects: (1) to determine and settle a disputed legal title, and (2) to have partition of a tract of real estate. It was held that the bill was multifarious. Besides, a partition bill will not lie where the legal title is denied, or where it depends on doubtful facts or questions of law. Such a proceeding is against the course of chancery practice, unless the dispute is in regard to an equitable title.

4. *Farson v. Sioux City* (1901) 106 Fed. 278: The holder of municipal bonds filed a bill against a city to compel the levy of a special tax for the maintenance of a sinking fund applicable to the payment of such bonds. The bill also sought an accounting in respect of money already collected which by law should have been turned into that fund, and further sought to hold the city treasurer and his sureties individually liable for the misappropriation of money derived from special assessments and which had not been turned into the sinking fund. It was held that the bill was multifarious for improper joinder both of parties and causes of action, and the bill was accordingly dismissed without prejudice in so far as it sought relief against the treasurer and his sureties. Said the court: "The question of the liability, if any, of the city treasurer and his sureties, certainly presents issues other and different from those involved in the case against the city, although it is true that they grow out of the same original transaction, and, viewing the matter as a question of expediency, it would seem best that it should not be attempted to deal with these differing issues in the one suit."

5. *Price v. Coleman* (1884) 21 Fed. 367: A bill presented a cause of action against the directors of an insolvent corporation arising out of their negligence and inattention. In the same suit it was sought to recover against the directors for losses suffered by the stockholders by reason of the latter having been induced by the misrepresentations of the directors to subscribe for new shares. The bill was held to be multifarious.

6. *New Hampshire Sav. Bank v. Rickey* (1903) 58 C. C. A. 294, 121 Fed. 956: A bill was filed by the creditors of a gas and electric light company to foreclose a mortgage, and officers of the company were joined as defendants. The cause of action against the company arose simply out of its default in the payment of interest on the mortgage debt. Relief was sought against the individual defendants on the ground that they, as officers and stockholders of the company, had

<sup>47</sup> See, however, *Barcus v. Gates* (1898; C. C. A.) 32 C. C. A. 337, 89 Fed. 783.

improperly converted rents accruing to the company into dividends and thus appropriated such rents to their own use instead of applying them to the mortgage debt. Such diversion appeared to have taken place before there was any default in the payment of the mortgage debt. It was held that the bill in question was demurrable for multifariousness.

7. *First Nat. Bank v. Peavey* (1896) 75 Fed. 156: The judgment creditor of a street railway company sought to hold an individual officer and stockholder of the company responsible for the indebtedness on four grounds: first, in respect of unpaid stock held by the defendant; secondly, in respect of money of the company wrongfully diverted and misappropriated by the defendant; thirdly, in respect of land conveyed by the company to the defendant without consideration; and, fourthly, in respect of a fraudulent misrepresentation on the part of the defendant whereby the plaintiff was induced to lend money to the company. The bill was held to be multifarious.

Alternative claims, each vested in many persons, of whom one has no interest in one claim, and others have no interest in the other, cannot be joined in one bill in equity.

*Stebbins v. St. Anne* (1886) 116 U. S. 386, 29 L. ed. 667: The town of St. Anne issued bonds in aid of the construction of a railroad. In accordance with an agreement between the railroad and the firm of contractors who built that part of the road, these bonds were delivered to the contractors. A bill was filed to compel the town to pay the bonds, and it was alleged that the town was indebted either to that firm or to the railroad company to the amount of the bonds. In the view that the debt was to the firm, the bill was not maintainable, because the interests of all the members of the firm were not represented in court by proper parties. If the view was adopted that the debt was owing to the railroad, then the difficulty was that certain parties plaintiff in the suit (who had been joined in respect of their interest in the partnership assets) had no interest at all in the debt. It was held that the bill could not be maintained, because of multifariousness both as to parties and subject-matter.

#### § 433. Suit for Specific Relief.

When the right of a party to specific relief is so encumbered that he cannot assert that right against another until he has removed the incumbrance, he cannot include an attempt to get rid of the incumbrance in a suit for specific relief, which he might be entitled to have if the incumbrance were out of the way.<sup>48</sup>

#### § 434. Joint Interest of Plaintiffs.

A bill filed jointly by two plaintiffs to secure the protection of a particular interest must contain allegations showing their joint inter-

<sup>48</sup> *Inman v. New York etc. Water Co. v. Thomas*, (1855) 18 How. 253, 16 L. ed. (1904) 131 Fed. 997, 999, citing 1 Dan. 368; *Walker v. Powers*, (1881) 104 U. Ch. Pr. (6th Am. ed.) 339. See *Shields* 8. 245, 26 L. ed. 729.

est in the subject-matter of the suit, and a joint injury, otherwise an objection can be taken for multifariousness.

*Baltimore etc. R. Co. v. Adams Express Co.* (1884) 22 Fed. 404: The B. & O. Railroad Co. and the B. & O. Express Co. filed a bill against the Adams Express Co. to restrain the latter company from refusing to accept and transmit parcels tendered to it by the plaintiffs. The allegation was that the B. & O. Express Co. was engaged in sending express matter over the lines of the B. & O. railroad and that in conjunction with said railroad it operated the B. & O. express between New York, Cincinnati, and other points. It did not appear but that the injury complained of might be a distinct injury to each of the plaintiff corporations. The bill was required to be amended.

A bill is multifarious for misjoinder of parties plaintiff where two individuals unite in preferring a creditors' bill, one of whom on his own showing has no valid claim against the debtor.<sup>49</sup>

#### § 435. Joint Interest of Defendants.

A bill to foreclose a mortgage is multifarious for misjoinder of parties defendant where one is joined as defendant who has no interest in or under the mortgage but whose claim is wholly adverse to both mortgagor and mortgagee.<sup>50</sup> A bill is sometimes said to be multifarious by reason of the misjoinder of defendants against whom no right of action is disclosed by the bill. But this is perhaps a misuse of terms. Where no case is made out against a particular defendant, he is entitled, on demurrer, to have the bill dismissed as to him for want of equity and not merely for multifariousness.

*Carmichael v. Tamarhans* (1899) 94 Fed. 561: A bill was filed against a city to abate a nuisance caused by its conducting and depositing sewage on the plaintiff's premises. Several individuals were also made defendants whose only connection with the nuisance was that they had deposited their drainage in the sewers erected under the authority of the city, a thing which, under the municipal ordinances, they had a right to do. A good case was made out against the city, but it was held that the individuals could not be liable and that the bill was rendered multifarious by their joinder.

#### § 436. Misjoinder of Legal and Equitable Causes.

It is a fundamental principle in federal practice that equitable and legal causes of action cannot be prosecuted in one suit, and a demurrer for multifariousness or misjoinder of causes will always be

<sup>49</sup> *Walker v. Powers* (1881) 104 U. S. 340, 24 L. ed. 644; *Peters v. Bowman* 245, 28 L. ed. 729. (1878) 98 U. S. 56, 25 L. ed. 91.

<sup>50</sup> *Dial v. Reynolds* (1877) 96 U. S.

sustained where it appears that two or more distinctly legal and equitable causes of action are presented in the plaintiff's declaration, petition, or bill. The objection is equally valid whether the proceeding is at law,<sup>51</sup> or in equity, though of course the question manifests itself in somewhat different aspects according as the proceeding is at law or in equity. A proceeding for the assessment of damages for the taking of private property for a public use is purely legal in its nature and cannot be united with a cause of action to set aside and vacate an award of damages made by referees and to have an injunction prohibiting the company exercising the power of eminent domain from appropriating the property in question.<sup>52</sup>

The ingrafting of a purely legal cause of action upon a bill in equity renders the suit multifarious, as where a cause of action for deceit against an individual is put in a bill to foreclose.<sup>53</sup> A bill is multifarious in which the plaintiff seeks to recover damages for the breach of a contract against one defendant, and which also seeks to enjoin the same and another defendant, with whom the former is alleged to be conspiring, from preventing the plaintiff from having the benefit of his contract. Here one cause of action is against one defendant at law and the other against both in equity.<sup>54</sup>

A cause of action against individuals for fraud or deceit cannot be united with a cause of action against a corporation for dissolution.

*Watson v. United States Sugar Refinery* (1895; C. C. A.) 15 C. C. A. 662, 68 Fed. 769: The plaintiff was induced to purchase stock in a corporation by false and fraudulent representations as to the company's solvency. As a stockholder he filed his bill seeking to have the company wound up. The bill also sought relief against the individual defendants who had fraudulently induced him to purchase the stock. It was held that unless this aspect of the case could be ignored as meaningless or superfluous, the bill must be considered multifarious.

### § 437. Stockholder Suing in Own Right and Right of Corporation.

A cause of action of a stockholder in his own right against a corporation cannot be conjoined with the cause of action of the corporation

<sup>51</sup> *Hill v. Northern Pac. Ry. Co. v. Cornell*, 90 Fed. 711; *Coit v. Sullivan* (1902) 113 Fed. 914, 51 C. C. A. 544; *Kelley Co.* (1897) 84 Fed. 724. *Goodyear Shoe Machinery Co. v. Dancel* (1902) 119 Fed. 692, 56 C. C. A. 300; *R. Co.* (1890) 135 U. S. 641, 10 Sup. Ct. Berkey v. Cornell (1898) 90 Fed. 711; 965, 34 L. ed. 295. *United States v. Boyd* (1902) 118 Fed. 89; *Stafford National Bank v. Sprague* (1881) 8 Fed. 377; (Ohio, 1880) *Kenton Furnace R. & Mfg. Co. v. McAlpin* (1890) 5 Fed. 737; (Va., 1898) *Berke-* *Security, etc. Loan Ass'n v. Buchanan* (1895) 14 C. C. A. 97, 66 Fed. 799. <sup>52</sup> *Cherokee Nation v. Southern Kan.* <sup>53</sup> *Thornton N. Motley Co. v. Detroit etc. Co.* (1904) 130 Fed. 396. <sup>54</sup> *Eq. Prac.* Vol. I.—18.



enforceable at the suit of a stockholder under the conditions stated in equity rule 94.

1. *Holton v. Wallace* (1895; C. C. A.) 66 Fed. 409 (1896) 77 Fed. 61, 23 C. C. A. 71: The bill in a stockholder's suit sought to recover on the corporation's right of action against one W. as assignee of unpaid shares of stock, and also against other individuals for fraudulent conduct connected with the sale of the company's railroad. The bill was held to be multifarious.

2. *Onurak v. Citizens' Street R. Co.* (1897) 78 Fed. 526: A bill was brought by a stockholder to be relieved of a purchase of stock fraudulently foisted on him and also to have his status as stockholder established as regarded certain stock which had been properly acquired. The bill further sought to redress a wrong done to the corporation by its officers in diverting large sums of money, the proceeds of an issue of bonds, away from the corporation. The bill was held multifarious.

3. *Leworne v. Mexican Int. Imp. Co.* (1899) 38 Fed. 629: A bill filed by corporation stockholders against the corporation is multifarious which proceeds on the three different ideas indicated thus: (1) to enjoin an alleged illegal issue of preferred stock, (2) to attack an alleged breach of trust on the part of the original board of directors in fraudulently issuing full paid stock for a nominal consideration, and (3) to vacate an alleged illegal purchase of a lottery grant. To the first cause of action the corporation is the only necessary defendant; to the others the delinquent directors are necessary parties. The first cause of action can be unconditionally asserted by the stockholders, subject to the rule governing stockholders' suits in the right of the corporation (equity rule 94).

### § 438. When Such Causes May Be Joined.

But it has been held that where the same facts that are sufficient to sustain a claim of a stockholder in his own right are also sufficient to sustain the claim asserted by the stockholder in the right of the corporation, the two causes of action may be joined if it is convenient to determine both matters in one suit.

*Jones v. Missouri etc. Co.* (1906; C. C. A.) 75 C. C. A. 631, 144 Fed. 705: Two light and power companies were consolidated under the laws of the state of their location, and a new or consolidated company was thus formed in their stead. A minority stockholder in one of the original corporations filed a bill in his own behalf and in behalf of others similarly situated, and also in behalf of his own constituent company, against the three companies and against the directors of his own constituent company. In this bill, plaintiff sought to accomplish two things, first, on behalf of his constituent company, to avoid the consolidation and restore said company to its original status and to the possession of its property. The grounds on which it was sought to accomplish this were that the consolidation was unauthorized by law and was a scheme fraudulently carried through by the majority for the purpose of acquiring the property of the plaintiff and others at an unconscionably low price. The plaintiff also prayed in the alternative for individual relief in this, that if the foregoing relief could not be granted, then the value of plaintiff's stock should be ascertained and its value

he declared a lien upon the property of his constituent company and upon the property of the consolidated company. The plaintiff's bill also prayed in its individual aspect, that the consolidated company be adjudged to pay to him the amount of this lien. A demurrer raising the question of multifariousness was overruled. Sanborn, Circuit Judge, said: "The gravamen of the bill, as we have seen, is the loss of the complainant and the other minority stockholders caused by the acts of the majority. Its purpose is to right this wrong, and it is to this end that the complainant prays in the alternative for the rehabilitation of his corporation or for a lien upon the property . . . for the value of his stock. The facts set forth in the bill are sufficient to sustain both his claim on his own behalf and his claim on behalf of the corporation. And where the same facts sustain the claim of a stockholder on his own behalf and his claim on behalf of his corporation and warrant the same or similar relief, it is not the duty of a court of equity, one of whose functions is to avoid a multiplicity of suits, to compel him to plead and prove these facts in two separate suits in order to obtain the relief to which he is entitled. It may determine both claims in the same suit and so mould its decree as to mete out substantial justice to all the parties."<sup>55</sup>

#### § 439. Germane Amendment Not Multifarious.

An amendment that asks for relief germane to the subject-matter of the bill does not render the bill multifarious.

*Irons v. Manufacturers' Bank* (1883) 17 Fed. 308: A creditors' bill was filed against an insolvent national bank, asking for a receiver and for the proper application of the bank's assets to its debts, but the bill did not seek to hold the stockholders liable. Pending the suit, a statute was passed by Congress authorizing the individual liability of the shareholder to be enforced in a creditors' suit. The plaintiff then amended his bill, made the stockholders parties, and sought to hold them. This was held to be proper.

#### § 440. Gibson's Eight Propositions.

We conclude our treatment of this aspect of the subject of multifariousness by reproducing here the eight propositions formulated by Chancellor Gibson as a means of testing the question whether a bill is multifarious in any given case. While they are not wholly definitive of the topic they at least embody some helpful suggestions.

To make a bill demurrable for multifariousness, it must contain all of the following characteristics:

1. It must join two or more causes of action against [one] or more defendants.<sup>56</sup>

<sup>55</sup> In the same case it was insisted for the defense that the plaintiff had a complete remedy at law, inasmuch as he might, at his option, affirm the contract of consolidation and maintain an action at law for the conversion of his stock against the consolidated company. But it was ruled that inasmuch as the plaintiff had the option to repudiate the consolidation, and sue in equity to avoid it, equity would entertain the suit. *Jones v. Missouri-Edison etc. Co.* (1906) 75 C. C. A. 631, 144 Fed. 777.

<sup>56</sup> In Gibson's text this proposition

2. These two or more causes of action must have no connection or common origin, but must be separate and independent.

3. The evidence pertinent to one or more of the causes must be wholly impertinent as to the other or others.

4. One or more of these separate and independent causes of action must be capable of being fully determined, without any necessity of bringing in the other cause or causes, in order to adjust any of the legal or equitable rights of the parties.

5. The decree proper as to one or more of these separate and independent causes of action must be exclusively against one or more of the defendants, and the decree proper as to the other cause or causes must be exclusively against the other defendant or defendants.

6. The relief proper against one or more of the defendants, on one or more of these separate and independent causes of action, must be distinct from the relief proper against the other defendant or defendants on the other cause or causes of action.

7. The satisfaction of the proper decree by any of the defendants, to the extent of his alleged liability, on any one or more of said distinct causes of action, must not be a satisfaction of the proper decree against the other defendant or defendants on the other cause or causes of action.

8. Upon the consideration of the entire bill the multifariousness must be apparent, and the misjoinder of distinct causes of action manifest.<sup>57</sup>

#### *Practice on Question of Multifariousness.*

#### § 441. How Objection of Multifariousness Raised.

The question of multifariousness may be raised by demurrer or answer, according as the state of the pleadings may justify; and if the defendant fails to raise the question, the court<sup>58</sup> may, of its own accord, take notice of such defect and make a proper decree overruling so much of the bill as may be necessary to reduce its issues to the required degree of unity; or, if that be impracticable, it may dismiss the entire bill.<sup>59</sup> But in a case where proof had been taken and completed on both issues tendered in the bill and a meritorious claim

reads "against two or more defendants"; but this is based on a local statute.

<sup>57</sup> See Gibson, *Suits in Chan.* (2d ed.) § 284.

These propositions have been judicially approved. *Von Auw v. Chicago Toy etc. Co.* (1895) 69 Fed. 448 (1895) 70 Fed. 939; *United States v. Guglard* (1897) 79 Fed. 21.

In the first of these cases a bill was held to be multifarious because it offended in all of the particulars enumerated; in the other, the bill was held not

to be multifarious because in three particulars it did not offend.

<sup>58</sup> *Chisholm v. Johnson* (1901) 106 Fed. 210; *Oliver v. Platt* (1845) 3 How. 333, 412, 11 L. ed. 622, 658; *Hefner v. Insurance Co.* (1887) 123 U. S. 747, 8 Sup. Ct. 337, 31 L. ed. 309.

<sup>59</sup> *Hefner v. Northwestern etc. Ins. Co.* (1887) 123 U. S. 752, 8 Sup. Ct. 339, 31 L. ed. 309; *State Trust Co. v. Kansas etc. R. Co.* (1904) 128 Fed. 129; *Greenwood v. Churchill* (1833) 1 Myl. & K. 559.

to relief was disclosed, the court refrained from exercising the right to dismiss the bill and, instead, required the plaintiff to signify in writing his election to insist on the one cause of action or the other as he might see fit.<sup>60</sup>

A parol exception, in the nature of a demurrer *ore tenus*, may be taken to test the question of the multifariousness of a bill where no formal objection has been previously taken on this ground by demurrer, plea, or answer. This practice arises from the fact that the court may take notice of such defect of its own motion.<sup>61</sup>

### § 443. Defect Waived by Answer to Merits.

If a defendant fails to raise the question of multifariousness in a timely and proper manner either by demurrer, plea, or answer, and, instead of so doing, answers to the merits, the defect is waived so far as he is concerned. The appellate court will take no notice of it, unless the trouble appears to be so grave as to interpose an obstacle to the proper administration of justice.<sup>62</sup>

*Oliver v. Platt* (1845) 3 How. 333, 11 L. ed. 622: In this case the objection of multifariousness was insisted on in argument in the supreme court, not having been previously raised by demurrer, plea, or answer. Mr. Justice Story said: "The objection of multifariousness cannot, as a matter of right, be taken by the parties, except by demurrer, or plea, or answer; and if not so taken, it is deemed to be waived. It cannot be insisted upon by the parties even at the hearing in the court below, although it may at any time be taken by the court *sua sponte*, wherever it is deemed by the court to be necessary or proper to assist it in the due administration of justice. And at so late a period as the hearing, so reluctant is the court to countenance the objection, that, if it can get on in the cause to a final decree without serious embarrassment, it will do so, disregarding the fault or error when it has been acquiesced in by the parties up to that time. *A fortiori* an appellate court would scarcely entertain the objection, if it was not forced upon it by a moral necessity."

Where the bill states a good cause of action and prays for appropriate relief, and this cause of action is fully supported by the proof, the bill will not on appeal be held multifarious merely because the plaintiff has also asked for relief to which he is not entitled.<sup>63</sup>

<sup>60</sup> *State Trust Co. v. Kansas etc. R. Co.* (1904) 128 Fed. 129. *Chew* (1844) 2 How. 642, 11 L. ed. 411; *Hefner v. Northwestern L. Ins. Co.* (1887) 123 U. S. 751, 31 L. ed. 311.

<sup>61</sup> *Liverpool etc. Ins. Co. v. Cluni* (1898) 88 Fed. 167. <sup>62</sup> *De Neuville v. New York etc. R. Co.* (1897; C. C. A.) 26 C. C. A. 306, 81

<sup>63</sup> *Briggs v. Sperry* (1877) 95 U. S. 401, 24 L. ed. 390; *Nelson v. Hill* (1847) 5 How. 132, 12 L. ed. 83; *Gaines v.*

### § 443. Who May Raise Objection.

The objection of multifariousness for misjoinder of causes of action cannot be raised by a defendant who appears not to be in a position to be injured thereby. If a bill is multifarious as to one defendant but not as to another, the latter cannot take advantage of the defect though the other may.<sup>64</sup>

*Metropolitan Trust Co. v. Columbus etc. R. Co.* (1900) 90 Fed. 690: The plaintiff sued both as an individual and as a trustee. One of the defendants was so situated that as to him the issue made by the plaintiff as individual and as trustee was the same. It was held that the bill should not be held multifarious on a demurrer filed by him, the other defendant more directly interested having made no complaint.

### § 444. Proper Order on Sustaining Objection.

When a demurrer for multifariousness or misjoinder of causes of action is sustained, it is not always proper to dismiss the plaintiff out of court without making provision for the protection of his rights. The court should use its discretion; and if the plaintiff wishes to amend by putting his pleading in unexceptionable form, he should be allowed to do so.<sup>65</sup>

A practice sometimes pursued is for the court to enter an order dismissing the bill in so far as it seeks relief inconsistent with the main cause of action and as to parties against whom such relief is sought;<sup>66</sup> or an order may be entered allowing the plaintiff leave to amend by excising such matter as is necessary to put the bill in proper shape, otherwise the bill to be dismissed;<sup>67</sup> or, again, a conditional order may be entered directing that the demurrer raising the question of multifariousness be sustained unless, within a specified time, the plaintiff dismisses as to the objectionable matter or objectionable parties.<sup>68</sup>

### § 445. Severance of Legal and Equitable Causes—Repleader.

Where a bill appears to be multifarious as comprising both legal and equitable demands, the court may, on motion, order the plaintiff to file a declaration in the law side on so much of the cause of action

<sup>64</sup> *Buerk v. Inhaeuser* (1881) 8 Fed. 278; *Hudson v. Wood* (1903) 119 Fed. 764. Compare *Smith v. Houston*

<sup>65</sup> *Cherokee Nation v. Southern Kan. Ry. Co.* (1890) 135 U. S. 651, 652, 34 L. ed. 300, reversing (1888) 33 Fed. 900. <sup>67</sup> *Central Nat. Bank v. Fitzgerald* (1899) 94 Fed. 16.

<sup>68</sup> *Keasby, etc. Co. v. Philip Cary*

<sup>66</sup> *Farson v. Sioux City* (1901) 106 Mfg. Co. (1901) 113 Fed. 492.

as embraces a legal claim. Though in the form of an order, such a ruling is not technically an order of repleader, but is merely a permission to the plaintiff to file his declaration in the law side with the alternative of having the legal matters in his bill dismissed or ignored. The term repleader is more properly applied to a case where issue has been joined on an immaterial point.<sup>69</sup>

#### § 446. Second Suit on Excised Cause of Action.

If a bill is held to be multifarious for the improper joinder of distinct causes of action and the plaintiff is required to eliminate one of the two causes of action from his bill, he may then or afterwards prosecute another separate suit founded on the cause of action so stricken from the bill. The decree in the first suit is not *res judicata* on the matter eliminated from the suit.

*Stark v. Starr* (1876) 94 U. S. 477, 24 L. ed. 276: A bill was filed *quis tunc* to compel a defendant to release an interest which he claimed in respect of certain premises by virtue of a land patent. Two grounds of relief were set forth, and upon objection for multifariousness of subject-matter, the plaintiff was compelled to elect as to the particular theory upon which he would proceed. The bill was accordingly amended so as to present only one title to relief. The plaintiff was cast in this suit, and the victorious defendant then brought an action of ejectment. The defendant in this action thereupon filed another bill seeking to enjoin this action at law, and, as a ground for relief, set up the matters and things which had been joined by him in the previous bill but which had been excised for multifariousness. It was now insisted for the defendant (plaintiff in the ejectment suit) that his adversary could not have the benefit of those matters for the reason that the first suit was conclusive. The contention was not sustained. The plaintiff in the first suit had been precluded by the court from having the benefit of those matters in that suit, and he should accordingly have the benefit of them in the second.

<sup>69</sup> *Chapman v. Yellow Poplar etc.* volved. This may be done where consolidated. (1906) 74 C. C. A. 331, 143 Fed. 204, 205. fusion of issues will not result from such procedure. *Blalock v. Equitable*

In an action at law, matter of purely legal procedure. *Blalock v. Equitable Life Assur. Soc.* (1896) 21 C. C. A. 208, 75 Fed. 43. But undoubtedly the equitable cognizance may sometimes be treated as surplusage, and the case may go on to trial on the legal issues in- better practice is to allow amendments to put the pleadings in good form.

## CHAPTER X.

### CAPACITY TO SUE AND BE SUED.

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*Capacity to Sue.*

## § 447. Who May Sue in Equity.

It is a rule, subject to unimportant exceptions, that any person in whom rights can legally inhere may maintain a suit in equity. There is no sort or condition of persons but may sue in the court of equity. This extends from the highest person in the state to the most distressed pauper.<sup>1</sup> The rule includes artificial persons, such as corporations, public or private. But not every person can maintain a suit in equity in his own name and capacity. If he is subject to a disability some unexceptionable person must stand sponsor, as it were, for him before the court.

A sovereign state has the same right to sue in its own courts for the redress or prevention of injury as any other corporation or individual. The United States and the several states may sue in the federal courts in their sovereign capacity.<sup>2</sup> A state may file an original bill in the supreme court of the United States.<sup>3</sup>

## § 448. Persons Incompetent to Sue.

In England the law formerly recognized certain classes of persons as being totally incompetent to maintain a suit in equity either in

<sup>1</sup> 1 Dan. Ch. Pr. 3.

<sup>2</sup> *Mississippi v. Johnson* (1866) 4

<sup>3</sup> *Cotton v. U. S.* (1850) 11 How. 231, Wall. 501, 18 L. ed. 441.

13 L. ed. 676; *Murray v. Hoboken Land etc. Co.* (1855) 18 How. 283, 15 L. ed. 377.



their own name or with the assistance of another. These were outlaws, excommunicates, attainted persons, and alien enemies. These four classes formed the chief exceptions to the rule allowing all persons to sue in the court of equity. Their disability was absolute so long as the condition that was the occasion of the disability continued; but if the condition terminated such persons could then sue as well as any person. In America outlawry, excommunication, and attainder are unknown to the law, and consequently no person can here be deprived of the right to resort to the court of equity on either of these grounds.<sup>4</sup>

#### § 449. Alien Enemy Unable to Sue During War.

The condition of the alien enemy is, however, here recognized as a ground of legal disability, and a person subject to this disability cannot sue so long as he remains an alien enemy, that is, so long as the state of war continues between this country and that of which he is a subject.<sup>5</sup> The disability of an alien enemy is not absolute in the sense of destroying his future right to sue. When peace has been made, the right is revived, or the court is opened to him as before. The effect of the existence of a state of war between two countries is to suspend the right of the subjects of either country to commence a suit in the courts of the other, or, if suit has already been begun prior to the breaking out of war, the right to continue the suit is thereby suspended until the return of peace.<sup>6</sup>

An alien enemy who is beneficially interested in a suit cannot prosecute the same, during the continuance of hostilities, in the name of his trustee.<sup>7</sup>

#### § 450. Suspension of Suit Brought before War Begins.

When a suit has been brought in one of our courts by an alien friend, and war then breaks out, the defense may be interposed by plea or answer, and the suit will be suspended during the continuance of hostilities.<sup>8</sup>

<sup>4</sup> 1 Dan. Ch. Pr. 50. The author also mentions bankrupts as being a class of persons incompetent to sue. See post, § 484.

<sup>5</sup> Wilcox v. Henry (1782) 1 Dall. 60, 1 L. ed. 41; Mumford v. Mumford (1812) 1 Gall. 366.

<sup>6</sup> Story, Eq. Pl. sec. 54.

<sup>7</sup> Crawford v. The William Penn (1815) Pet. C. C. 106.

<sup>8</sup> Parkinson v. Wentworth (1814) 11 Mass. 26; Hutchinson v. Brock (1814) 11 Mass. 119; Bell v. Chapman (1813) 10 Johns. 183.

In *Es p. Boussmaker* (1806) 13 Ves. Jr. 71, a claim in bankruptcy put in by an alien enemy was admitted, but the dividend was reserved to be paid on the return of peace.

### § 451. Subject of Hostile Country Living in This Country.

If a subject of a foreign country with which we come to be at war resides in our own limits during the time when the war is waging and is not bidden to depart, he may sue in our courts, as he is then considered under the protection of this country; and any engagement or contract made with an alien enemy can be enforced by him, if when the contract was made he was acting under a license from this government.\*

### § 452. Incapacity of Personal Representatives and Receivers.

An executor or administrator appointed under the law of a foreign state, country, or jurisdiction will not be admitted to bring suit in his representative capacity in the courts of a jurisdiction wherein he was not appointed.<sup>10</sup> In the federal courts this rule is applied so as to prevent such personal representative of the estate of a deceased person from suing in the circuit court of a state other than that of the appointment.<sup>11</sup> Similarly, a receiver appointed by a court in one state cannot sue in his capacity as receiver in the circuit court of another state.<sup>12</sup> The rule in regard to personal representatives and receivers does not form a real exception to the general principle that all persons may sue in the court of equity. The law here simply rests on the ground that the capacity of personal representative or receiver cannot be recognized in other jurisdictions than that wherein the appointment was made. A personal representative or receiver is not, in his representative capacity, considered a legal person outside of the jurisdiction of his appointment.

### § 453. Persons Subject to Qualified Disability.

There are several sorts of persons who are subject to a qualified disability, inasmuch as they are not competent to prosecute a suit independently and in their own name. If a suit is to be instituted in their behalf it must be brought for them by some person *sui juris* who can be held responsible for the costs of the proceeding. Minors form one of these classes of persons. By reason of their mental inca-

\* *Crawford v. The William Penn* 19 L. ed. 757 (1870) 12 Wall. 121, 20 L. (1815) Pet. C. C. 106. ed. 279; *D'Auxy v. Porter* (1890) 41

<sup>10</sup> *Campbell v. Hubbard* (1888) 11 Fed. 68; *Mills v. Knapp* (1890) 39 Fed. 592; *Ellis v. Holder* (1890) 12 Fed.

<sup>11</sup> *Johnson v. Powers* (1891) 130 U. 663; *Mellus v. Thompson* (1892) 4 Cliff. S. 158, 35 L. ed. 112; *Kerr v. Moun* 125; *Brownson v. Wallace* (1890) 4 (1824) 9 Wheat. 565, 6 L. ed. 161; *Blatchf.* 465.

*Noonan v. Bradley* (1869) 9 Wall. 394, <sup>12</sup> See *post*, §§ 2670-2675.

capacity to attend to their own business as well as by reason of their inability to bind themselves for the costs of the suit, or to make any contract relative thereto, they are not permitted to institute a suit directly in their own name, and on their own motion. But as these persons frequently need the active interposition of the court of equity to protect their interests, it is allowable for some other proper person to institute a suit in their behalf.

#### § 454. Infant Suing by Next Friend.

A person who institutes suit in behalf of an infant is called the next friend, or *prochein ami*. Normally and properly the individual who acts as next friend to an infant should be one who is close to him by natural or legal ties. The father, for instance, and the guardian appointed by law are very proper persons to act as next friend. But no definite relationship is at all essential, as the court will see to it that the infant is not prejudiced by the course of legal proceedings. The next friend is really a purely formal party, and is little more, apparently, than a sort of security for costs. Suits are sometimes brought on behalf of infants by their lawful guardians.<sup>13</sup> In such cases the guardian is really a next friend whether he is actually so styled in the record or not. The court may, in any case, upon proper representations made to it, appoint a special guardian *ad litem* to institute and prosecute a suit for an infant, just as it may appoint such a party to defend for an infant. But the effect of this is merely to constitute the guardian *ad litem* a sort of formal next friend, though certainly he would be considered more particularly the agent of the court than the ordinary next friend.

A bill may be filed by a next friend on behalf of an unborn infant (*en ventre sa mere*) if its interests require protection. A bill for an injunction to stay waste on lands that will belong to such an infant at its birth is a common illustration of such a suit.<sup>14</sup>

One who acts as next friend for an infant must have no interest whatever hostile to that of the infant. The nearest person in point of kinship, not interested adversely to him, is supposed to be the one most fitted to take the infant under his care and institute any suit that may be necessary to assert and maintain his rights. This is the

<sup>13</sup> All infants and other persons so direct for the protection of infants and incapable may sue by their guardians, other persons. Eq. Rule 87. if any, or by their *prochein ami*; subject to such orders as the court may see fit to make. <sup>14</sup> Gibson, *Suits in Chan.* (2d ed.) § 82.

reason why such person prosecuting the suit of the infant for him is called a next friend.<sup>15</sup>

An infant who sues by next friend is, in the absence of fraud or unfairness, bound by a proper decree rendered in that suit.<sup>16</sup>

**§ 455. Infant Plaintiff Transposed to Be Defendant.**

Where a suit is instituted on behalf of several including an infant who sues by next friend, the court will transpose the infant and make him a defendant, if it appears that his interest is likely to be the better protected thereby.<sup>17</sup>

**§ 456. In Whose Name Infant's Suit Brought.**

A suit instituted on behalf of an infant by a person acting as his next friend must be brought in the name of the infant, he being in reality the proper party-litigant. The *prochein ami*, or next friend, is neither technically nor substantially the party to the suit. He acts in a purely representative character and resembles an attorney or guardian *ad litem*.<sup>18</sup> The next friend of an infant or a guardian suing in his behalf being merely a formal party, the residence of such party does not affect jurisdiction in a case where jurisdiction depends on diverse citizenship.<sup>19</sup>

**§ 457. Authority of Next Friend.**

Just how far the control of the next friend over a suit instituted on behalf of an infant extends is not precisely determined. The next friend is considered to be, in a way, an appointee of the court and is subject to its will. The court can remove one and appoint another if it sees fit to do so. It is the same with the guardian *ad litem*. The control these representatives have is subject to the higher control of the court. The ultimate guardianship is in the tribunal before which the suit is pending. It follows that the court will always protect the infant from any chicanery on the part of his next friend or

<sup>15</sup> *Jarvis v. Crozier* (1899) 98 Fed. 753. <sup>18</sup> *Voss v. Neineber* (1895) 68 Fed. 947; *Blumenthal v. Craig* (1897) 81

<sup>16</sup> *Corker v. Jones* (1884) 110 U. S. 317, 320, 28 L. ed. 161, 162. Compare *Pennington v. Smith* (1897) 78 Fed. 399, *Kansas etc. R. Co. v. Morgan* (1896) 24 C. C. A. 145, *reversing* (1896) 75 Fed. 157; *Dodd v. Ghiselin* (1886) 27 Fed.

<sup>17</sup> *Jarvis v. Crozier* (1899) 98 Fed. 753. 405.

<sup>19</sup> *Morgan v. Potter* (1895) 15 Sup. Ct. 590, 157 U. S. 195, 39 L. ed. 670.

guardian *ad litem*. In a case where a father acted as next friend for his son, who was suing for wages, the court refused to recognize a discharge as binding which had been executed by the father in his capacity as next friend.<sup>20</sup> A next friend has no power to bind an infant by a release not in conformity with the decree rendered in favor of the infant.<sup>21</sup>

#### § 458. Suit in Behalf of Insane and Weak-Minded.

The practice in regard to the institution of suits by and on behalf of insane persons, imbeciles, and other afflicted persons who are incompetent to manage a suit for themselves, is substantially the same as that which prevails in regard to suits brought by infants. If a person is so feeble-minded and imbecile as to be incompetent to take care of his own interest, but yet has not been adjudged to be insane, he can sue by any next friend, or guardian *ad litem* acting as next friend.

#### § 459. Court's Control over Litigation.

Where a suit is brought on behalf of an insane or incompetent person by a next friend, it is within the power and discretion of the court to supersede the next friend by a guardian *ad litem*, the latter being considered more particularly the immediate agent of the court. The next friend sometimes turns out to be an officious intermeddler acting more for the promotion of his own interests than in the interest of the person whom he represents. The court of equity acts with a broad discretion in controlling the practice in such cases and always looks to the protection of the weak and incompetent. The power to displace the next friend by a guardian *ad litem* may be exercised in a summary way and without notice to the next friend.<sup>22</sup>

#### § 460. Suit by Committee of Lunatic.

If a person has been adjudged to be insane and a curator of his estate has been appointed, the suit in his behalf should normally be brought by the curator, or committee, such custodian being treated in effect as his next friend. Where the curator of an insane person is not, by virtue of his appointment, vested with the title to his ward's property, any action brought by the curator in behalf of the insane

<sup>20</sup> *The Etna* (1838) 1 Ware, 474, Fed. Cas. No. 4,542.      <sup>22</sup> *King v. McLean Asylum* (1894) 26 L.R.A. 784, 64 Fed. 331, 12 O. C. A.

<sup>21</sup> *Morris v. Harmer* (1833) 7 Pet. 145, 168, 554, 566, 8 L. ed. 781, 786.

ward must be brought in the name of the ward, he being the real party in interest. In such a case jurisdiction depends on the residence of the insane ward and not on that of the curator, the latter being only a nominal party.<sup>23</sup>

If the guardian or curator of an insane person violates his trust or fails to sue for the insane person, a suit can, of course, be brought in behalf of the latter by any person *sui juris* acting as next friend. And, generally, where there is no guardian, curator, or committee, to institute suit for an insane person, any other suitable person may act as his next friend and institute suit for him.<sup>24</sup>

#### § 461. Suit Brought in Name of Incompetent Party.

If a bill is filed in the name of one who is *non compos mentis* and, by reason of that fact, incompetent so to sue, the proper practice is for the defendant to apply to the court to strike the bill from the files as having been filed without authority, owing to the mental incapacity of the plaintiff; or on application to the court an order may be made staying the proceedings until a committee or next friend may be appointed.<sup>25</sup>

#### § 462. Wife Sues or Is Sued with Husband.

By reason of the disability incident to coverture, a married woman cannot maintain a suit in her own right either at law or in equity without the joinder of her husband. In all suits in equity in which a feme covert sues or is sued, the husband must be a party plaintiff or defendant whenever he is within the jurisdiction of the court and can be made a party.<sup>26</sup>

#### § 463. Exceptions.

To this rule there are certain recognized exceptions based on necessity. For instance, where relief is sought by the wife against her husband, it is manifestly impossible that the husband should be joined even as a nominal plaintiff, for if he did the bill would show on its face that such husband was seeking relief against himself. Here the wife is permitted to sue by next friend or, under modern practice acts, in her own name. Again, where the husband labors under a legal disability to sue, he cannot be joined with the wife without

<sup>23</sup> *Stout v. Rigney* (1901) 46 C. C. A. 459, 107 Fed. 546. <sup>25</sup> *Dudgeon v. Watson* (1886) 23 Fed. 161.

<sup>24</sup> *Wiggins v. Bethune* (1886) 29 Fed. 61. <sup>26</sup> *Taylor v. Holmes* (1892) 14 Fed. 498, 513.

defeating the suit, and hence she must then be permitted to sue without him. Illustrations of this are found in cases where the husband was formerly considered civilly dead by reason, for instance, of an attainder of felony, perpetual banishment, or the taking of orders. The same is true where the husband appears to be an alien who has left the country or who has never been therein.<sup>27</sup> In these cases the wife is treated to all intents and purposes as a feme sole and is permitted to sue alone. In all other situations the general rule is, as stated above, that in suits brought in the right of the wife, the husband must be joined.<sup>28</sup>

When the husband is only formally joined in a suit brought in right of the wife, he is to all intents and purposes a mere *prochein ami*; and the fact that he is so noted in the bill constitutes no defect in the pleading.<sup>29</sup>

#### § 464. When Wife Joined in Suit by Husband.

When the husband sues in his own right, the wife is not, generally speaking, a proper party. But if the action be brought in respect of property accruing to the husband by virtue of his marital rights, then the wife may, or must, be joined in actions at law according to the following distinction, that is to say, if the property sued for by the husband be such as vests absolutely in him by virtue of the marriage, then the husband sues alone. This is applicable to all her personal property as distinguished from her choses in action. If the property sued for consists of the wife's choses in action, not previously reduced to possession by the husband, then the wife must be joined because this sort of property does not belong to the husband absolutely but only conditionally.

In equity, on the other hand, the rule that the wife must be joined is universally applied in all suits brought by the husband to recover and reduce to his own use personalty or choses in action which accrue to him absolutely or conditionally in virtue of his marital right.<sup>30</sup> The reason for this requirement is that in every case where the husband resorts, either from convenience or necessity, to the court of equity, this court recognizes and will enforce the wife's equity to a

<sup>27</sup> 1 Dan. Ch. Pr. 118.

held that the husband was a proper

<sup>28</sup> McKnight v. McKnight (1853) Fed. Cas. No. 8,867a. In United States v. Pratt etc. Co. (1883) 18 Fed. 708, the wife was sued in respect of a liability incident to her separate estate. It was

party.

<sup>29</sup> Bein v. Heath (1848) 6 How. 228,

12 L. ed. 416. Compare Douglas v. Butler (1881) 6 Fed. 228.

<sup>30</sup> 1 Dan. Ch. Pr. 119.

settlement. This interest is such as to make her a necessary and doubtless an indispensable party.

§ 465. Suit in Respect to Wife's Separate Property.

In suits by the wife to recover her separate property she may sue by her next friend, the husband being also joined as plaintiff;<sup>31</sup> or she may sue by her husband himself as next friend. But in all cases where any question arises or may arise whereby the husband's interest may become adverse to that of the wife, she should sue by a next friend other than the husband, and he should be made defendant. If the husband sues as next friend for the wife and subsequently an adverse interest appears in him, the court would, of course, substitute another as next friend and permit the husband to be made defendant.<sup>32</sup>

If the husband refuses to join in a suit brought by the wife in respect of her separate estate, a *prochein ami* may be joined by amendment and the husband made a formal defendant.<sup>33</sup>

§ 466. Local Statutes Affecting Marital Rights.

As a general rule the equity practice in regard to the joining of the husband in a suit brought by a married woman and in regard to her suing alone is governed by the rules prevailing in the courts of equity and is not affected by local statutes permitting her to sue without the husband.<sup>34</sup> However, the local statutes affecting the marital rights of the husband in regard to the property of the wife have, in some cases, materially modified the practice in regard to joining the husband in suits brought by the wife.<sup>35</sup>

*Lorillard v. Standard Oil Co.* (1880) 2 Fed. 902: This was a suit to enjoin the infringement of a patent. The plaintiff was a married woman and the patent belonged exclusively to her. It was held that the husband need not be joined as co-plaintiff. Said Blatchford, Circuit Judge: "The rule of joining

<sup>31</sup> *Gallego v. Chevalier* (1826) 2 Brock. 285, Fed. Cas. No. 5,200; *Ward v. Amory* (1853) 1 Curt. C. C. 419, Fed. Cas. No. 17,146; *Hunt v. Danforth* (1856) Fed. Cas. No. 6,887. In this case the circuit court held that the California statute authorizing the wife in certain situations to sue alone, had not changed the equity practice. In actions at law, the rule is that the state practice shall be followed. *Texas etc. R. Co. v. Humble* (1899) 97 Fed.

<sup>32</sup> *Bein v. Heath* (1848) 6 How. 228, 240, 12 L. ed. 416, 421. state practice shall be followed. *Texas etc. R. Co. v. Humble* (1899) 97 Fed.

<sup>33</sup> *Taylor v. Holmes* (1882) 14 Fed. 498, 514; *Douglas v. Butler* (1881) 6 Fed. 228; *Johnson v. Bail* (1862) 14 N. J. Eq. 426. 337, 38 C. C. A. 502; *Seymour v. Chicago etc. R. Co.* (1871) Fed. Cas. No. 12,685.

<sup>34</sup> *Wills v. Pauly* (1892) 51 Fed. 257. (1893) 16 Fed. 168, Eq. Prac. Vol. I.—39, <sup>35</sup> *Armstrong v. Syracuse Screw Co.*



husband with wife in suits to recover her personal property was founded upon the principle of unity of existence and interest between husband and wife, in law, and the right of the husband in the wife's personal property, and the care exercised by courts in regard to those who are not in a situation to take care of their own rights. These principles being now changed for this jurisdiction, the practice based on them necessarily falls. *Cessante ratione cessat lex.*" 36

### § 467. Wife's Right to Control Suit.

Inasmuch as the disability of a married woman to sue results from her coverture and not from any supposed lack of discretion, no suit brought by one who acts as next friend will be entertained, where it appears that she did not consent to the bringing of the suit and is desirous that it should be dismissed.<sup>37</sup>

### § 468. Corporation Sues in Own Name.

When it becomes proper to join a corporation as party to a suit either as plaintiff or defendant, it should sue or be sued in the corporate name. In most, and perhaps all, of the legislative acts, either general or special, under which corporations are nowadays created there is to be found a special provision authorizing the corporation to sue and be sued in its corporate name. Possibly at this day and time the right of suing and being sued in the corporate name would be inferred from the legislative grant of corporate life even were the express provision to this effect omitted. But if a case were to arise where the court could see clearly that corporate life had been granted but the right of suing and being sued in the corporate name had been withheld, there the corporation would have to sue like other incompetent parties, by a next friend, and defend, no doubt, by a guardian *ad litem*,—an office that would naturally be filled by some officer of the company, presumably its president.<sup>38</sup> But this is now a point of purely academic interest, for by the universal usage and practice in this country the corporation sues and is sued in its corporate name.<sup>39</sup>

A suit brought in the name of the president of a corporation acting

<sup>36</sup> *Voorhees v. Bonesteel* (1872) 16 Wall. 16, 31, 21 L. ed. 268, 271; *Armstrong v. Syracuse Screw Co.* (1883) 16 Fed. 168. Compare *Tilton v. Barrell* (1882) 14 Fed. 609, affirmed *Barrell v. Tilton* (1887) 7 Sup. Ct. 332, 119 U. S. 637, 30 L. ed. 511.

<sup>37</sup> Story, Eq. Pl., sec. 61.

<sup>38</sup> It seems to have been sometimes recognized as a proper practice for a corporation to sue by its president or by an attorney, these being manifestly

considered as being a sort of next friend to the corporation. See *Dinamore v. Maroney* (1859) Fed. Cas. No. 3,920; *Bank of U. S. v. Roberts* (1822) Fed. Cas. No. 934.

<sup>39</sup> *Huntington v. Palmer* (1881) 104 U. S. 482, 26 L. ed. 833; *Holton v. Wallace* (1895) 66 Fed. 409, 77 Fed. 61, 23 C. C. A. 71; *Bradley v. Richardson* (1851) Fed. Cas. No. 1,786; *Bank of U. S. v. Roberts* (1822) Fed. Cas. No. 934.

in his official capacity may stand as the proper suit of the corporation when objection has not been taken thereto by the defendant in the court below.

*Fortier v. New Orleans Bank* (1884) 112 U. S. 439, 23 L. ed. 764: A bill was filed in the name of "Albert Baldwin, in his capacity of president of the New Orleans National Bank." During the litigation in the circuit court the suit was treated by all the parties and by the court as the suit of the corporation and not as the suit of Albert Baldwin individually. The pleadings and orders in the case were entitled "New Orleans National Bank v. Fortier," and in the appeal bond the same style appeared. Furthermore, the cause of action was one on which it was appropriate for the corporation to sue. It was held that the suit was to all intents and purposes the suit of the corporation and, as such, was maintainable in this form; or, at least, the defect was not available for purposes of reversal in the supreme court.

#### § 469. Suit by Stockholder in Right of Corporation.

Though, as has just been shown, a suit in behalf of a corporation is usually brought in the corporate name and by the corporation itself, there are certain conditions under which a stockholder is permitted to maintain a suit in his own name on a right of action that, properly speaking, is vested in the corporation. This situation arises where it appears that directors of the corporation who are in control of it have wrongfully refused, on demand, to institute a suit in its name. The conditions under which the stockholder's suit may be brought are specified in equity rule 94, which merely embodies principles already recognized by the federal courts before that rule was formulated.<sup>40</sup>

Equity Rule 94: Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transactions of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.<sup>41</sup>

<sup>40</sup>Equity rule 94 applies to suits *keag Nat. Bank* (1890) 134 U. S. 527, brought by a stockholder of a national bank to the same extent as to suits by

<sup>41</sup>In *Groel v. United Electric Co.* (1904) 132 Fed. 252, Lanning, District Judge, gives a satisfactory account of the genesis and effect of equity rule 94. In concluding this discussion, he says;

In cases where a suit is maintainable under this rule, the corporation, we may suppose, is subject to a disability, resulting from the breach of trust on the part of its officers; and the individual stockholder is permitted, on account of his interest, to come forward and maintain a suit, in his own name, in behalf of himself and other stockholders. The technical right of action on which the suit is based is vested in the corporation, and the corporation is made a party defendant.<sup>42</sup> The following cases embody illustrations of the stockholders' suit and exhibit something of its scope and nature:

1. *Porter v. Sebin* (1893) 149 U. S. 478, 37 L. ed. 818: In this case Mr. Justice Gray, speaking of the stockholders' suit, said: "The right to maintain a suit against the officers of a corporation for fraudulent misappropriation of its property is a right of the corporation; and it is only when the corporation will not bring the suit, that it can be brought by one or more stockholders in behalf of all. The suit, when brought by stockholders, is still a suit to enforce a right of the corporation, and to recover a sum of money due to the corporation; and the corporation is a necessary party, in order that it may be bound by the judgment."

2. *Dodds v. Woolsey* (1855) 18 How. 331, 15 L. ed. 401: A state law incorporating a bank fixed a rate of taxation in lieu of all other taxes. A subsequent statute provided for a different and higher rate of taxation. This law was questioned by the bank as being an invasion of its contract rights under the charter. Nevertheless the directors refused to bring suit on behalf of the corporation and proposed to use its money to pay the taxes assessed under the act in question. A bill filed by an individual stockholder was successfully maintained to prevent the threatened illegal diversion of the corporate funds. The plaintiff showed in the bill that he had applied to the directors to bring suit on behalf of the corporation and that they had refused to do so. The court came to the conclusion on the facts that this refusal of the directors was a breach of duty and hence was not conclusive against the stockholder as a fair exercise of

"It is apparent . . . that it was language of a fact that in a properly not the purpose of the court, by the framed bill should always have appeared, though, perhaps, before its promulgation of the rule in any wise promulgation, averments which would have to alter or modify any of the jurisdictional principles upon which such a bill excluded any reasonable inference of collusion would have been deemed sufficient. It follows that, as to the allegations of a bill, the rule requires nothing substantially new. The only really new thing required by it is that the allegations of the bill shall be verified by oath. . . . The rule, except as to the provision concerning the verification of the bill by oath, is, in effect, merely confirmatory of what was by correct practice before required."

<sup>42</sup> *Davenport v. Dows* (1873) 18 Wall. 626, 21 L. ed. 936.

But before its promulgation it had always been the law that the facts alleged in the bill should be those from which no inference of collusion could reasonably be drawn, and that, if at any time in the progress of a suit it appeared to be a collusive one, the bill would be dismissed. The provision of the rule that the bill shall contain an allegation that the suit is not collusive, merely requires the statement in express

discretion by them. The corporation itself and the directors were joined as defendants with the tax collector.

3. *Pollock v. Farmers' Loan etc. Co.* (1895) 157 U. S. 429, 39 L. ed. 759: A bill was filed by a stockholder in a trust company to prevent an injury threatened to it by the proposed payment of income tax levied on its property under the authority of an act of Congress. The directors had been requested to bring suit to have the tax assessment declared unconstitutional but had refused to do so. The suit was successfully maintained.

4. *Bell v. Rutland R. Co.* (1899) 93 Fed. 513: In a suit by stockholders to restrain the officers of a railroad company from complying with a state statute relating to fares, it appeared that the plaintiffs, as stockholders, directed a communication to the president, calling attention to the provision of the railroad charter which was thought to be violated by the statute and requesting the directors to decline to give effect to the act and to resist its enforcement in every lawful way. This was held to be a sufficient compliance with equity rule 94 to entitle the plaintiffs to maintain the suit.

#### § 470. Two Types of Stockholders' Suits.

There are two distinct types of stockholders' suits: first, those in which the corporation has refused to do its duty by suing to avert a threatened injury; and, secondly, those in which the directors have made themselves personally liable for neglect or breach of duty, and the corporation refuses to proceed against them. In both these types of cases the stockholder is permitted to come in and sue in the right of the corporation, a proper showing being made in accordance with the equity rule.<sup>43</sup>

#### § 471. Plaintiff Must Show Genuine Effort to Procure Suit by Corporation.

Before a stockholder can maintain a suit in the corporate right, he must show an actual, genuine, and earnest effort made in good faith by him to get the managing directors to authorize a suit in the name of the company. A failure to seek action on the part of the corporation itself cannot be excused by vague and general averments of complicity on the part of the directors in the wrongs against which relief is sought;<sup>44</sup> nor does the mere inconvenience of the making of demand supply any reason why the stockholder should not proceed to make it, or at least attempt to make it.

*Corbus v. Gold Mining Co.* (1903) 187 U. S. 455, 47 L. ed. 255: The bill did not allege the necessary demand on the directors to take steps to protect the

<sup>43</sup> *Dewing v. Perdicaries* (1877) 93 (1895) 69 Fed. 176; *Watson v. U. S. Sugar Refinery* (1895) 15 C. C. A. 662, U. S. 193, 24 L. ed. 654.

<sup>44</sup> *Ziegler v. Lake St. R. Co.* (C. C. 68 Fed. 769. A.; 1895) 22 C. C. A. 465, 75 Fed. 662

corporation. But it was shown that those directors were living in San Francisco, while the managing agent of the corporation was in Alaska. It was also shown that the plaintiff stockholder lived in Alaska, and the suit was brought there. It was held that this was not sufficient to excuse want of the demand. Said the court: "The rule requires that the plaintiff must set forth with particularity the efforts made by him to secure action by the directors. It does not appear that he made any effort to secure such action, but he relies simply on the distance of the directors from the place where he resides and in which the court is held, as an excuse for not applying to them. We are of opinion that the excuse is not sufficient. He should at least have shown some effort. If he had made an effort and obtained no satisfactory result either by reason of the distance of the directors or by their dilatoriness or unwillingness to act, a different case would have been presented, but to do nothing is not sufficient."

#### § 472. Idle Demand on Directors Unnecessary.

However, if the directors of a corporation are shown by the allegations of the bill to be in league with one who is using the corporation to wrong the complaining party, the averment of a previous demand on the directors to sue, as required in equity rule 94, is unnecessary. The law, it is said, does not demand an idle ceremony.<sup>45</sup>

#### § 473. Suit Must Not Be Collusively Brought.

In entertaining stockholders' suits, the federal courts have an eye open for circumstances showing that the cause was collusively made in order to bring the suit within the jurisdiction of the federal court. Where the circumstances sufficiently show that such is the case, the suit will be dismissed, as a matter of course.<sup>46</sup> The provision in rule

<sup>45</sup> *Monmouth Inv. Co. v. Means* (C. C. A. 1906) 80 C. C. A. 527, 151 Fed. 168; *Berwind v. Canadian Pac. R. Co.* (1899) 98 Fed. 158; *De Neuville v. New York etc. R. Co.* (1897) 28 C. C. A. 306, 81 Fed. 10. In *Watson v. U. S. Sugar Refinery* (C. C. A. 1895) 68 Fed. 749, 15 C. C. A. 662, 34 U. S. App. 81, it was shown that certain of the directors who were practically the sole executive officers and managers of the company were responsible for the pursuance of a policy alleged to be detrimental to the company. But there were other directors as to whom no complicity was shown. It was held that under the circumstances a making of demand for the directors to proceed for relief in the name of the corporation was not excused. Said the court: "The rule is well settled that a stockholder cannot maintain a suit for a wrong to the corporate body without showing either an effort to set the corporation in motion to redress the wrong, an application made to the board of directors to that end, or that such effort or application would be useless. And this requirement is not satisfied by an allegation that the directors or a majority of them are acting in the interest or under the control of others who are charged with the fraud."

<sup>46</sup> *Hawes v. Oakland* (1881) 104 U. S. 450, 460, 461, 26 L. ed. 827, 832; *Detroit v. Dean* (1882) 106 U. S. 537, 27 L. ed. 300; *Quincy v. Steel* (1887) 120 U. S. 241, 30 L. ed. 624; *Huntington v. Palmer* (1881) 104 U. S. 482, 26 L. ed. 833.

94 requiring the bill to allege that the suit is not a collusive one is not complied with by an allegation that the suit is "brought in good faith and for the collection of, and to compel the collection of, what your orator believes to be a meritorious claim."<sup>47</sup>

**§ 474. When Making of Collusive Parties Immaterial.**

The objection that a stockholders' suit was collusively made goes only to the situation where jurisdiction is dependent on diverse citizenship. Hence the objection does not apply, or loses its force, where the case made in the bill shows a cause of action arising under the constitution or laws of the United States, for the circuit court here has original jurisdiction on this ground alone. There cannot be said to be collusion where no purpose is to be subserved by it and where there is no reason or motive for it. Even if there should be a mistaken intention to make a collusive case, yet the existence of the genuine cause of action under the constitution or laws of the United States causes the collusion to miss the mark, so to speak, and the existence of that mistaken purpose does not affect the suit in any respect.<sup>48</sup>

**§ 475. Equity Rule 94 Inapplicable in Removal Cause.**

In cases removed from a state court, equity rule 94 has no technical force. Here the question is whether the state court had jurisdiction, and whether the federal court has the same jurisdiction in succession to the state court. If it is shown, in a removal case, anywhere in the entire record that the corporation will not proceed to vindicate its right, a shareholder may be allowed to prosecute the suit, subject to the general principles of equity pleading and practice and without reference to the rule.<sup>49</sup> The requirement of the equity rule that the bill be verified by oath does not apply to a suit brought in a state court and thence removed to a federal court.<sup>50</sup>

**§ 476. Rule Not Applicable upon Dissolution of Corporation.**

In a suit brought by a stockholder after the dissolution of a corporation, it is not necessary to comply with equity rule 94. Upon

<sup>47</sup> *Quincy v. Steel* (1887) 120 U. S. 241, 30 L. ed. 624. Compare *Ball v. Rut-* 58 Fed. 497, 500.

*land R. Co.* (1899) 93 Fed. 512. <sup>50</sup> *Maeder v. Buffalo etc. Co.* (1904)

<sup>48</sup> *Simpson v. Union Stock Yards Co.* 132 Fed. 280. (1901) 110 Fed. 799.

dissolution of a corporation the functions of the directors, managers, and shareholders cease; and they no longer occupy the same relations to each other and to the defunct corporation as they did during its life. Accordingly, the stockholders must then seek whatever redress they can merely in their own individual capacity. Whether the rule applies to a suit brought by a stockholder within the limited period of "posthumous existence" allowed by some state statutes for winding up corporate affairs is a different question. In such a case, assuming that the rule applied, it was held that a sufficient compliance with the rule was shown where the bill alleged that the plaintiffs had applied to such of the directors as they could find to take corporate action, but they were scattered throughout the country and, having apparently abandoned their functions, refused to act in the matter.<sup>51</sup>

#### § 477. Stockholder's Suit in Individual Right.

The stockholder's suit in the right of his corporation is to be distinguished from the suit which the stockholder may sometimes maintain in his own right. It sometimes so happens that, upon a particular state of facts, the stockholder may have a right of action in his own name and behalf, and the corporation may also at the same time have a right of action in its own name and behalf. If the suit is brought in the individual right, equity rule 94 does not apply.<sup>52</sup>

#### *Capacity to Be Sued.*

#### § 478. Who May Be Sued.

As a general rule every person who may sue in a court of equity may likewise be sued there. Even those who, by reason of their disability, are incompetent to sue alone may be directly sued in a court of equity, for they cannot plead their disability as a ground of immunity from suit. Still, as we shall see, where such persons are sued, a special procedure must be adopted in regard to their defense.

#### § 479. Sovereign Not Subject to Suit.

An exception to the rule that allows a suit to be brought against any person, natural or artificial, is presented in the case of the sovereign. It is a general principle of jurisprudence that a sovereign state or nation cannot be used in its own courts without its own

<sup>51</sup> *Lafayette County v. Neely* (1884) 21 Fed. 733.

<sup>52</sup> *Dewing v. Perdicaries* (1878) 96 U. S. 193, 24 L. ed. 654.

consent.<sup>53</sup> And there is no distinction in this respect between suits against the government directly and suits against its property.<sup>54</sup>

**§ 480. How Far Set-off Available against Government.**

In the federal courts the doctrine that the sovereign is not subject to suit is carried so far that it has been held that when the United States is a plaintiff and the defendant pleads a set-off no decree can be rendered against the government, though it should appear on striking a just balance that a certain sum is rightly due to the defendant. So if the United States sues an individual in one of the federal courts and fails to establish the claim, no judgment can be rendered in favor of the defendant against the United States for costs.<sup>55</sup> But one who is made defendant in a suit brought by the government may have the benefit of a legal or equitable set-off to the extent necessary to defeat the demand.<sup>56</sup>

**§ 481. Statutes Authorizing Suits against Government.**

The consent of the sovereign to be sued in respect to certain matters is usually manifested in special statutes authorizing particular suits to be brought against it.<sup>57</sup> It is for Congress alone to determine when and under what circumstances the United States may be sued.<sup>58</sup> No state law is valid the effect of which would be to make the general government liable to suit in its own courts.<sup>59</sup>

Congressional enactments permitting suits to be brought against the United States are not to be enlarged beyond their express terms,<sup>60</sup> as the sovereign has full power to yield its consent to be sued only under such restrictions as it sees fit to make.<sup>61</sup>

<sup>53</sup> *U. S. v. Thompson* (1878) 98 U. S. 489, 25 L. ed. 195; *U. S. v. Lee* (1882) 106 U. S. 239, 27 L. ed. 106 U. S. 226, 27 L. ed. 183; *Belknap v. Schild* (1896) 161 U. S. 16, 40 L. ed. 601; *Stanley v. Schwalby* (1896) 162 U. S. 269, 40 L. ed. 935; *Price v. U. S.* (1899) 174 U. S. 375, 43 L. ed. 1012; *Pacific Whaling Co. v. U. S.* (1903) 187 U. S. 452, 47 L. ed. 255; *Hayercraft v. U. S.* (1874) 22 Wall. 92, 22 L. ed. 740.

<sup>54</sup> *The Siren* (1868) 7 Wall. 154, 19 L. ed. 130. <sup>55</sup> *De Groot v. U. S.* (1866) 5 Wall. 431, 18 L. ed. 703. <sup>56</sup> *Schaumburg v. U. S.* (1890) 103 U. S. 667, 26 L. ed. 599; *The Siren* (1868) 7 Wall. 154, 19 L. ed. 130. <sup>57</sup> *Reeside v. Walker* (1850) 11 How. 290, 13 L. ed. 700; *U. S. v. O'Keefe* (1870) 11 Wall. 182, 20 L. ed. 133; *U. S. v. Lee* (1882) 106 U. S. 239, 27 L. ed. 106; *Belknap v. Schild* (1896) 161 U. S. 16, 40 L. ed. 601; *Stanley v. Schwalby* (1896) 162 U. S. 269, 40 L. ed. 935; *Price v. U. S.* (1899) 174 U. S. 375, 43 L. ed. 1012; *Pacific Whaling Co. v. U. S.* (1903) 187 U. S. 452, 47 L. ed. 255; *Hayercraft v. U. S.* (1874) 22 Wall. 92, 22 L. ed. 740.

<sup>58</sup> *Florida v. Georgia* (1854) 17 How. 512, 15 L. ed. 202; *United States v. Lee* (1882) 106 U. S. 239, 27 L. ed. 106; *Austin v. U. S.* (1894) 155 U. S. 430, 39 L. ed. 211. <sup>59</sup> *Carr v. U. S.* (1878) 98 U. S. 437, 25 L. ed. 211. <sup>60</sup> *Phelps v. McDonald* (1878) 99 U. S. 304, 25 L. ed. 475; *Price v. U. S.* (1899) 174 U. S. 377, 43 L. ed. 1013.

<sup>61</sup> *Murray v. Hoboken Land, etc. Co.* (1855) 18 How. 283, 15 L. ed. 377; *Beers*



### § 482. States of the Union Not Generally Subject to Suit.

As the federal courts were originally constituted, the immunity from suit in those courts which the United States enjoyed, by reason of its sovereignty, did not extend to the several component states of the Union. On the contrary it was held that a state could be sued by a citizen of another state.<sup>62</sup> The Eleventh Amendment to the Constitution of the United States changed this rule, by declaring that the judicial power of the United States shall not extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. This amendment took from the United States courts all jurisdiction over controversies between states and individuals. But the amendment does not include controversies between two or more states or between a state and a foreign state. As to such controversies the United States supreme court still has jurisdiction.<sup>63</sup>

The immunity from suit enjoyed by the several states under the Eleventh Amendment is a privilege personal to the state, and it may, so the supreme court has said, be waived, if the state chooses to do so.<sup>64</sup> This suggestion is, however, one that needs to be cautiously applied, as the amendment in question plainly says that the judicial power shall not be construed to extend to suits brought against states by the citizens of another state or of a foreign state.

### § 483. Suit against Foreign Potentate.

A foreign sovereign cannot be compelled to appear in the courts of this country, or be made liable to their judgment, so long as he remains in his own dominions; for the jurisdiction of our courts is bounded by the territorial limits of the country. If, however, a foreign ruler comes personally within the limits of the jurisdiction of the courts of this country, he may become liable to judicial process.<sup>65</sup> But though a foreign sovereign might be sued in one of our courts, if he submits, our courts, on principles of comity, are inclined not to entertain such suits, and they will usually remit a plaintiff who seeks to secure redress against a foreign sovereign to the proper politi-

*v. Arkansas* (1867) 20 How. 529, 15 L. ed. 992; *Nichols v. U. S.* (1868) 7 Wall. 126, 19 L. ed. 127.

<sup>62</sup> *Chisholm v. Georgia* (1793) 2 Dall. 419, 1 L. ed. 440.

<sup>63</sup> *Rhode Island v. Massachusetts* (1838) 12 Pet. 731, 9 L. ed. 1263; *South Dakota v. North Carolina* (1904) 192 U. S. 315, 48 L. ed. 469; *Cohen v. Vir-*

*ginia* (1821) 6 Wheat. 406, 5 L. ed. 291; *Cunningham v. Macon, etc. R. Co.* (1883) 109 U. S. 451, 27 L. ed. 994.

<sup>64</sup> *Clark v. Barnard* (1883) 108 U. S. 447, 27 L. ed. 784.

<sup>65</sup> *Santissima Trinidad* (1822) 7 Wheat. 353, 5 L. ed. 471. See *Osborn v. Bank of U. S.* (1824) 9 Wheat. 370, 6 L. ed. 235.

cal channels of the government.<sup>66</sup> A sovereign, it is said, "cannot, consistently with his dignity, stoop to appear at the bar of other nations."<sup>67</sup>

**§ 484. Liability of Bankrupt to Suit.**

It is sometimes said that bankrupts cannot sue, or be sued. The reason of this is that their estate, by operation of law, has become vested in their assignees, and they cannot legally sue, or be sued, because they have no interest in the subject-matter of the suit, and no decree can consequently be pronounced against them. What is meant by bankrupts not being able to sue and not being subject to be sued is that, if they sue, no decree can be rendered in their favor; and if they are sued, no decree can be rendered against them, if the fact of their assignment or discharge duly appears. But if a defendant fails to plead the bankruptcy of the plaintiff, or fails to plead his own discharge in bankruptcy, the suit will proceed as though no bankruptcy existed.<sup>68</sup> And in all cases, of course, the provisions of the bankruptcy statute, in force at the time, will control in regard to the right of the bankrupt to sue and be sued.

*Defense of Persons under Disability.*

**§ 485. How Persons under Disability Must Defend.**

As already indicated, persons laboring under disability are subject to be sued the same as persons *sui juris*, but in order that their interests may be properly guarded it is necessary that there should be some discreet and unexceptionable person to look after their interests. To this end the court will always appoint a guardian *ad litem*. It is the duty of this person, as an appointee and special representative of the court, to look after the defense and see to it that all the proceedings against the party under disability are conducted in accordance with the law.<sup>69</sup>

**§ 486. Jurisdiction over Infant.**

Consent will not give jurisdiction as to a minor. All proceedings affecting him or his interests must be *in invitum*. No general guard-

<sup>66</sup> *U. S. v. Dieckman* (1875) 92 U. S. 524, 23 L. ed. 744. <sup>68</sup> *Simmons v. Baynard* (1887) 30 Fed. 532; *Bank v. Ritchie* (1834) 8 Pet.

<sup>67</sup> *L'Invincible* (1816) 1 Wheat. 264, 128, 8 L. ed. 890.

<sup>68</sup> 4 L. ed. 84.

<sup>69</sup> *Gibson, Suits in Chan.* (3d ed.)

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ian can as a rule voluntarily appear for him. He must first be served and brought into court, and then a guardian *ad litem* will be appointed to defend for him.<sup>70</sup> The joining of the general guardian of an infant in a bill against such infant does not dispense with the necessity for the appointment of a special guardian *ad litem* to defend the suit on behalf of the infant. The general guardian may, of course, be appointed guardian *ad litem*.<sup>71</sup>

#### § 487. Appointment of Guardian ad Litem.

The most common occasion for the appointment of a guardian *ad litem* arises by reason of the infancy, or minority, of one or more of the defendants. An infant against whom a suit is filed or who, as a defendant, has an interest in property to be affected by the decree, is treated as a ward of the court and as being under its special protection from the time such disability is made to appear; and in order that the court may, at the very inception of the suit, be duly apprised of the fact that one or more of the defendants are infants, it is required that the prayer for process shall contain a statement that such and such defendants are infants, or otherwise under guardianship, if this be the case.<sup>72</sup> As soon as the court is judicially informed that a party is an infant, his rights are protected by the court.

#### § 488. How Appointment Effected.

The guardian *ad litem* is usually appointed upon motion or petition. This should be in writing and the name of the person proposed as guardian should be stated, as well as his willingness or consent to serve.<sup>73</sup> Of course, in appointing a guardian *ad litem* the court will name a competent person not interested adversely to the infant. Usually the office of guardian *ad litem* falls to some one of the younger practitioners of the court.<sup>74</sup>

#### § 489. When Actual Order of Appointment Not Absolutely Essential.

While the defense of a suit brought against a minor should always be committed to a special guardian *ad litem*, a decree will some-

<sup>70</sup> *Fitch v. Cornell* (1870) Case No. 4,834; *Carrington v. Brents* (1832) Fed. Cas. No. 2,446.

<sup>71</sup> *O'Hara v. MacConnell* (1876) 92 U. S. 150, 23 L. ed. 840.

<sup>72</sup> Equity Rule 23.

<sup>73</sup> *Rhineland v. Sanford* (1806) 3 Day 279; *Barclay v. Govers* (1803) 1 Cranch, C. C. 147, Fed. Cas. No. 973.

<sup>74</sup> But in *Bank v. Ritchie* (1834) 8 Pet. 128, 8 L. ed. 890, it was said that the guardian *ad litem* to defend for a minor is usually the nearest relation not concerned, in point of interest, in the matter in question. If such a person, not being a competent lawyer, is chosen as guardian *ad litem*, it would of course be necessary for him to have

times be upheld where this step is not formally taken. Thus, in a bill to confirm a sale made under an order of court, some of the interested parties were minors. They were served and their father came in and answered as guardian *ad litem*, submitting their interests to the protection of the court. There was, however, no order actually appointing him guardian *ad litem*. The proceedings were upheld notwithstanding this irregularity, the decree being otherwise in all respects proper.<sup>75</sup>

The fact that an infant, in a suit brought in a state court, has defended a suit by his general guardian rather than by a guardian *ad litem*, does not affect the validity of the decree where the local practice permits of this mode of defense.<sup>76</sup>

#### § 490. Responsibility of Guardian *ad Litem*.

The guardian *ad litem* is responsible for the propriety and conduct of the defense made in behalf of his ward. If an answer put in by him for the infant is scandalous or impertinent he will be liable for the costs. He will be removed and another appointed, if he fails to do his duty as guardian *ad litem*.<sup>77</sup>

#### § 491. Answer of Guardian *ad Litem*.

The guardian *ad litem*, after being properly appointed, proceeds to put in an informal answer for his ward. After referring to the fact that the respondent is a minor, the answer submits the rights of the party to the keeping and protection of the court.<sup>78</sup> The reason for the very informal nature of the answer of a guardian *ad litem* is found in the fact that in a suit against an infant or in any way involving the interests of an infant, no decree adverse to such infant can be entered on any admission as to the truth of the allegations of the bill contained in the answer of the guardian *ad litem*. The decree must be based on proof.<sup>79</sup> Misstatements or omissions in the answer of a guardian *ad litem* will not be permitted to injure the infant.<sup>80</sup>

the necessary legal advice to enable him to proceed in the proper way to make defense for the infant.

<sup>75</sup> *Simmons v. Baynard* (1887) 30 Fed. 532.

<sup>76</sup> *Colt v. Colt* (1883) 111 U. S. 560, 578, 28 L. ed. 520, 525.

<sup>77</sup> 1 Dan. Ch. Pr. 221.

<sup>78</sup> *Simmons v. Baynard* (1887) 30 Fed. 532.

<sup>79</sup> *White v. Joyce* (1894) 158 U. S. 146, 39 L. ed. 927; *Bryan v. Kennett* (1885) 113 U. S. 179, 196, 28 L. ed. 906, 914; *Bank v. Ritchie* (1834) 8 Pet. 128, 8 L. ed. 890; *White v. Miller* (1895) 15 Sup. Ct. 788, 158 U. S. 128, 39 L. ed. 921; *Walton v. Coulson* (1831) Fed. Cas. No. 17,132.

<sup>80</sup> *Lenox v. Notrebe* (1834) Fed. Cas. No. 8,246c.

### § 492. Decree Affecting Infant Must Be Based on Pleadings and Proof.

The guardian *ad litem* has no power to enter into a consent decree, in the proper sense of this term, whereby the interests of his ward will be affected. That is to say, any decree affecting the rights of the infant must derive its validity from some other source than the consent of the guardian *ad litem*. It must be based on the pleadings and proof. "The court, whose duty it is to protect the interests of the infant, should see to it that they are not bargained away by those assuming, or appointed, to represent him."<sup>81</sup>

### § 493. Consent of Guardian.

However, the fact that the guardian *ad litem* consents to a decree affecting the rights of an infant does not necessarily raise any presumption against its validity. Consent of the guardian *ad litem* affords no sufficient basis for a decree, but it does not militate against it. With the approval of the court, a compromise decree can be entered adjusting the rights of all the litigants, including infants, which will be good, at least as against a bill of review.<sup>82</sup>

### § 494. Guardian's Control over Course of Proceedings.

The rule that disables a guardian *ad litem* from making admissions adverse to the interests of the infant whom he represents and from entering into any binding consent decree does not prevent a guardian *ad litem* from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved. Thus it has been held that a guardian *ad litem* may give an effectual and binding consent whereby the cause is heard by a court sitting in one division rather than in another, the determination of the suit being thereby hastened.<sup>83</sup> In making such agreements the guardian *ad litem* acts in the capacity of solicitor or counsel. In no case will a decree entered on the consent of a solicitor be held binding on the infant unless it appears that the solicitor was duly authorized to act as representative of the infant.<sup>84</sup>

### § 495. Binding Force of Decree against Infant.

An infant who is properly brought into a suit and who regularly defends by guardian *ad litem* is bound in the absence of fraud or col-

<sup>81</sup> Kingsbury v. Buckner (1889) 134 U. S. 680, 33 L. ed. 1059.

<sup>82</sup> Franklin Savings Bank v. Taylor (1893) 4 C. C. A. 55, 53 Fed. 854.

<sup>83</sup> Kingsbury v. Buckner (1889) 134 U. S. 680, 34 L. ed. 1047, 10 Sup. Ct. 838.

<sup>84</sup> White v. Miller (1893) 15 Sup. Ct. 788, 158 U. S. 128, 39 L. ed. 921. See

lusion on the part of his guardian *ad litem*; <sup>85</sup> but if no service is had on an infant defendant, a judgment entered in that proceeding is irregular and may be reversed on appeal, though a guardian *ad litem* was appointed and appeared for him. But the decree is good against collateral attack.<sup>86</sup>

§ 496. Whether Infant to Be Made Plaintiff or Defendant.

If a suit in which an infant is interested can be conducted equally well by making the infant a defendant as by joining him as a plaintiff, he should in every case be made a defendant; and in a case where the infant is improperly named as a plaintiff the court will transpose such infant to the defendant side and will require that a defense be made for him by guardian *ad litem*.

*Jervis v. Grosier* (1899) 98 Fed. 753: A bill was filed by a tenant in common to have partition of land owned by himself and others, some of whom were infants. The plaintiff sued in his own right and also joined himself as next friend of the infants. There was no question in dispute as to the interests of the plaintiff and the infants whom he represented. Yet it was held that the infants should be transposed to the defendant side, and that a guardian *ad litem* should be appointed to defend for them. It did not appear that the plaintiff was related to the infants or that he was in any way authorized to represent them. The court said: "Legal proceedings in favor of an infant should in every respect be strictly guarded, for the reason that an infant on coming of age can repudiate a suit brought in his name, and the court would be compelled to strike out his name as plaintiff and add it as a defendant." It was further observed that the plaintiff in a suit is always subject to be held liable for costs, and infants should not be subjected to this danger when the cause can proceed equally well with them on the other side.

§ 497. Lunatic Defends by Committee or Guardian *ad Litem*.

The lunatic, though totally incompetent to act for himself, must in all cases where a decree is sought that would affect his interest be made an actual party defendant to the suit, and process should be prayed against him. A lunatic who is served answers by his committee appointed for that purpose under an order of the court. If there is no committee, the court may appoint a guardian *ad litem* to defend for him as in case of an infant.<sup>87</sup>

*White v. Joyce* (1895) 158 U. S. 147, 39 L. ed. 928. ment in behalf of his client and had failed to apply for a rehearing, see

<sup>85</sup> For a case in which the record was held not to show evidence of collusion or fraud on the part of a guardian *ad litem*, although such guardian had not apparently made every possible argu- *Kingsbury v. Buckner* (1890) 134 U. S. 650, 33 L. ed. 1047, 10 Sup. Ct. 638.

<sup>86</sup> *Nelson v. Moon* (1843) 3 McLean 319, Fed. Cas. No. 10,111.

<sup>87</sup> *Harrison v. Rowan* (1819) 4 Wash.

### § 498. Suit against Alien Enemy.

While the condition of alien enemy disables a party from suing in the courts of the country with which his own sovereign is at war, it does not prevent him from being sued in the courts of a hostile country by a subject of such country, if the suit brought by the latter is necessary to protect property over which the court where the suit is brought has jurisdiction. In such case the alien enemy may be sued if good service can be obtained upon him.<sup>88</sup>

As an alien enemy may be sued, it follows, by necessary consequence, that he may use measures looking to the proper defense of his suit to the same extent as any other defendant. The disability to sue does not disable him from making a defense when he is sued. The liability to be sued carries with it the right to use all the means and appliances of defense.<sup>89</sup>

### § 499. Suit against Wife—Husband Joined.

If a married woman is sued, her husband must usually be joined with her as a defendant. This rule does not apply where the husband has permanently left the country, or, as the old formula runs, "has abjured the realm." In such case the wife may be sued alone. The same rule applies where the husband is an alien enemy.<sup>90</sup>

### § 500. Joint Answer—When Wife Answers Separately.

When the husband is formally joined as a co-defendant with the wife, it is usual and proper for them to answer jointly, but sometimes the court will permit the suit to proceed against the wife separately. This will be done where the demand is against her in respect of her separate estate and the husband cannot be affected by the decree. In such cases the husband being a merely formal party, the wife will be compelled to answer alone. In cases where the suit does not concern the wife's separate estate, the wife may make a special application to be permitted to answer separately; and if the situation warrants it, the permission will be granted.<sup>91</sup>

Of course, in all cases where it is permissible for the husband to

C. C. 202, Fed. Cas. No. 6,143; 1 Dan. Ch. Pr. 219, 220.

Service of process on the committee of an adjudged lunatic confined in an insane asylum has been held to be good service on the lunatic himself, *Sullivan v. Andoe* (1881) 6 Fed. 641,

<sup>88</sup> *Masterson v. Howard* (1873) 18 Wall. 99, 105, 21 L. ed. 764, 765.

<sup>89</sup> *McVeigh v. United States* (1870) 11 Wall. 259, 20 L. ed. 80.

<sup>90</sup> 1 Dan. Ch. Pr. 205.

<sup>91</sup> 1 Dan. Ch. Pr. 206.

sue the wife, he must of necessity proceed against her alone, otherwise the suit could not be conducted at all.<sup>92</sup>

**§ 501. Suit against Infant Feme Covert.**

If an infant defendant is also a married woman, it is necessary that she should defend by guardian *ad litem* the same as any other infant. The usual practice is to appoint her husband guardian *ad litem* where he is joined as a co-defendant and there is no conflict of interest between them. The husband, being properly joined in such suit, may answer and defend for the wife; but if he does not do so and permits a *pro confesso* to be taken against both, a valid judgment cannot be entered against the infant wife on such *pro confesso*. It is imperative in such case that some one be appointed as guardian *ad litem* to defend for her.<sup>93</sup>

<sup>92</sup> 1 Dan. Ch. Pr. 205.

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<sup>93</sup> O'Hara v. MacConnell (1876) 93 U. S. 160, 23 L. ed. 840.



## CHAPTER XI.

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*General Principles Governing Making of Parties.*

**§ 502. Parties in Causes in Federal Courts.**

Hardly any topic in the range of equity practice has been the occasion of more debate than the subject of parties. What persons may or must be made parties to the contemplated suit? This question is one that is beset with unusual difficulty in the practice of the federal courts, for in many cases the jurisdiction of these courts is dependent on the citizenship of the various parties and to decide whether a particular person is indispensable as a party is often to decide whether the court has power to entertain the suit at all. By reason of their constitution and limited powers these courts are often confronted by situations in which some person who would, under the ordinary canons of practice, be deemed a desirable or necessary party, is beyond the reach of the process of the court, or otherwise so placed that, if he were served or should voluntarily come in, the jurisdiction of the court would be destroyed. This has made it of prime importance to the administration of justice in the federal courts that the rules of equity practice should be relaxed as far as may be done without violation of principle, in order that a suit cognizable in these courts should not be defeated in any case by the absence of a dispensable party. As a natural consequence of this we find that the decisions of the federal courts are replete with discussions of the subject of parties, and distinctions have been drawn by these courts that have not been noticed by the courts of other jurisdictions. As has been remarked by Mr. Justice Miller, the learning on the subject of parties in equity is, indeed, very copious.<sup>1</sup>

**§ 503. General Rule.**

The general principle of equity practice regarding the persons who should be made parties to a suit, is found in the rule that all should

<sup>1</sup> *Barney v. Baltimore* (1867) 6 Wall. 284, 18 L. ed. 826.

be joined (either as plaintiffs or defendants) who have any title or interest in the subject-matter of the controversy, or whose interests may be affected by the decree to be rendered in the suit, or whose joinder is necessary in order that full justice may be done to others. The fact that relief of any sort is obtainable against a party is a sufficient ground for joining him as a defendant, and the fact that relief of any sort is grantable in his favor is likewise a sufficient reason for joining him as a plaintiff. While on the one hand no one should be made a party who clearly has no connection with the controversy,<sup>2</sup> yet all ought to be made parties who have any interest to be affected by the decree.<sup>3</sup> Only those who are actually parties to a bill, either in person or by representation, can participate in the fruits of the litigation or be bound by the decree;<sup>4</sup> and where it appears on the record that persons whose interest will be affected are not joined as parties or properly represented, the court will not proceed to judgment.<sup>5</sup> "In every case there must be such parties before the court as to insure a fair trial of the issue in behalf of all."<sup>6</sup>

#### § 504. *Liberality of Equity Practice as Regards Making of Parties.*

The rule as to parties in equity is much broader and more inclusive than the rule applicable in cases at law. This arises from the nature of the equitable remedies and from the principles governing the courts of equity in the application of those remedies. When a controversy is drawn into equity, that court always acts on the principle of making a complete termination of every element of contention in

<sup>2</sup> *Mechanics' Bank of Alexandria v. Beverley* (1820) 5 Wheat. 313, 5 L. ed. Seton (1828) 1 Pet. 299, 7 L. ed. 152, 97; *Dandridge v. Washington* (1829) 2 House v. Mullen (1874) 22 Wall. 42, Pet. 370, 7 L. ed. 454; *Shields v. Barrow* (1854) 17 How. 130, 15 L. ed. 158; *McMicken v. United States* (1877) 97 U. S. 204, 24 L. ed. 947; *Traders Nat. Bank of Chicago v. Campbell* (1871) 14 Wall. 87, 20 L. ed. 832; *Stone v. Towne* (1875) 91 U. S. 341, 23 L. ed. 412; *New York v. Connecticut* (1790) 4 Dall. 3, 1 L. ed. 715.

<sup>3</sup> *Williams v. Bankhead* (1873) 10 Wall. 583, 22 L. ed. 184; *Story v. Livingston* (1839) 13 Pet. 359, 10 L. ed. 200; *Ribon v. Chicago R. I. & Pac. R. Co.* (1872) 16 Wall. 446, 21 L. ed. 367; *Caldwell v. Taggart* (1830) 4 Pet. 190, 7 L. ed. 828.

<sup>4</sup> *Hook v. Payne* (1871) 14 Wall. 252, 20 L. ed. 887; *Bigler v. Waller* (1871) 14 Wall. 298, 20 L. ed. 891; *Kerr v. Watts* (1821) 5 Wheat. 550, 5 L. ed. 328.

<sup>5</sup> *Coy v. Mason* (1854) 17 How. 590, 15 L. ed. 125; *Conn v. Penn* (1820) 5 Wheat. 424, 5 L. ed. 125; *Marshall v.*

*McArthur v. Scott* (1835) 113 U. S. 340, 391, 28 L. ed. 1015, 1061.

*Abbot v. American Hard Rubber Co.* (1861) Fed. Cas. No. 9; *Branch v. Macon & B. R. Co.* (1875) Fed. Cas. No. 1,809; *Bunce v. Gallagher* (1867) Fed. Cas. No. 2,138; *Cole Silver Min. Co. v. Virginia & Gold Hill Water Co.* (1871) Fed. Cas. No. 2,990; *Garnett v. Macon* (1825) Fed. Cas. No. 5,245; *Hoxie v. Carr* (1832) Fed. Cas. No. 6,802; *North ern Indiana R. Co. v. Michigan Cent. R. Co.* (1853) Fed. Cas. No. 10,321; *Ward v. Arredondo* (1825) Fed. Cas. No. 17,148; *West v. Randall* (1820) Fed. Cas. No. 17,424.

it. To this end it favors the introduction of all parties who are in any way concerned in the subject-matter of the suit and whose presence makes possible the giving of complete relief to others. Equity, it is often said, does not undertake to do things by halves. The circumstance that by the drawing of all issues into one suit or that by the inclusion of many parties in one inquiry the issues are made more complex is, as a rule, no obstacle to the maintenance of the suit. The court of equity does not encourage multifariousness of issues; but where many issues are properly determinable in one suit, the court is entirely competent so to determine them.

**§ 505. Each Case Determined on Own Facts—Judicial Discretion.**

The broad principle of inclusion which requires that all who are interested in a controversy and all who may be necessary to the complete administration of justice between others shall be joined as parties, is at its basis partly a rule of convenience and policy. It has been adopted in furtherance of justice. Hence it is not an absolutely inflexible rule;<sup>1</sup> and the application of it, within certain limits, is in the sound discretion of the court. Being introduced for the purposes of justice, it is susceptible of modification when such modification will promote the ends of justice. The same rules are by no means to be enforced in all cases; and as a result no general principle applicable to all situations can be laid down. Each case depends more or less on its own particular facts. A court will never dismiss a meritorious suit merely because a party who ought to be before the court is not there, if justice can safely be administered without that party. The question who ought to be made parties in a suit in equity is a very different one from the question who must be made parties in that suit.

**§ 506. Limits of Discretion.**

Yet in some respects and to a certain extent the rules governing the making of parties in equity are as unyielding as any other rules the court is called on to apply. For instance, a court of equity will no more entertain a suit in the absence of a necessary and indispensable party, either plaintiff or defendant, than it would proceed to judgment in the absence of a litigable controversy. On one occasion when the supreme court was urged to sanction a suit where an indispensable party had been omitted in order to save jurisdiction, Mr.

<sup>1</sup> *Barney v. Baltimore* (1837) 6 Wall. 234, 18 L. ed. 326.

Justice Grier observed: "But it is insisted, that the court should disregard it as merely a technical rule, which does not affect the merits of the controversy. The same reason would require the court to reject all rules of pleading. These rules are founded on sound reason, and long experience of their benefits. It is no wrong or hardship to suitors who come to the courts for a remedy, to be required to do it in the mode established by the law."<sup>3</sup>

### § 507. Classification of Parties in Federal Equity Courts.

The peculiar limitation on the jurisdiction of the federal courts, as regards the character, or citizenship, of the parties before the court, has forced these courts to make a classification of parties that accords well with the requirements of justice and with the particular organization of such courts. This division cannot pretend to be scientifically accurate or exhaustive; but it has been made with an eye to the cases that the federal courts have to deal with, and for practical purposes it is quite as good as any other classification would be. The general principle of this classification is well indicated by Mr. Justice Curtis in the following case:

*Shields v. Barrow* (1854) 17 How. 130, 139, 15 L. ed. 158, 160: Said the learned judge: "The court here points out three classes of parties to a bill in equity. They are: (1) Formal parties. (2) Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. (3) Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

The foregoing language constitutes the leading statement of the rule governing the classification of parties in equity suits prosecuted in the federal courts. It has been restated in the same or a very similar form numberless times. One of the best of these subsequent statements is from the pen of Mr. Justice Miller:

*Berney v. Baltimore* (1867) 6 Wall. 280, 18 L. ed. 825: "There is," said he, "a class of persons having such relations to the matter in controversy, merely

<sup>3</sup> *Farni v. Tesson* (1861) 1 Black 300, 315, 17 L. ed. 67, 69.

formal or otherwise, that while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such, that if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties if within its jurisdiction, before deciding the case; but if this cannot be done, it will proceed to administer such relief as may be in its power, between the parties before it. And there is a third class, whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction."

Mr. Justice Bradley has also presented the same general truth very clearly as follows:

*Williams v. Bankhead* (1873) 19 Wall. 563, 571, 22 L. ed. 184, 187: "The general rule as to parties in chancery is, that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First. Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Secondly. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Thirdly. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant."

One of the most intelligible and suggestive ways of putting the ideas embraced in the preceding extracts from the decisions of the supreme court is found in the following language of one of our circuit judges:

*Donovan v. Campion* (C. C. A.; 1898) 29 C. C. A. 30, 35 Fed. 72: Said Judge Sanborn: "Every indispensable party must be brought into court, or the suit will be dismissed. The complainant may join every proper party, and he must join every proper party who would have been a necessary party, under the old chancery rule, unless his joinder would oust the jurisdiction of the court as to the parties before it, or unless he is incapable of being made a party by reason of his absence from the jurisdiction of the court or otherwise. The old chancery rule is that all those whose presence is necessary to a determination of the entire controversy must be, and all those who have an interest in the subject-matter of the litigation which may be conveniently settled therein may be, made parties to the suit. The former are termed the 'necessary' and the latter the 'proper' parties."

**§ 508. Jurisdiction as Affected by Presence or Absence of Parties.**

The question of jurisdiction, as affected by the presence or absence of parties and by the extent of their interest in the subject-matter of the controversy, presents itself in two somewhat different aspects, according as the person whose interest is under consideration has in fact been made a party to the suit or not. In the first place, if a person whose citizenship is such as possibly to defeat jurisdiction has been joined as a plaintiff or defendant, then the question arises whether that party has such an interest as makes him a real and proper party to the suit. The rule here applied is that if he is only a nominal or formal party and has no real interest in the suit, his presence will be disregarded, otherwise the suit will be dismissed. On the other hand, if a person whose character is such as to defeat jurisdiction if he were joined as a party, or who is so situated that he cannot be reached by process, is omitted as a party, then the question arises whether he is a dispensable party. If so, the suit goes on, otherwise it is dismissed.

From this the practitioner will perceive that if, in any case, the jurisdiction of the court is likely to be adversely affected by the character of a particular person as regards citizenship, it is better to adopt the alternative of omitting such party altogether. If the plaintiff does this, he can then possibly show that the person so omitted is dispensable. If he pursues the alternative of joining that party he must then depend on the possibility of showing that the party is so far nominal or formal as not to affect jurisdiction at all. The omission of a proper party will not defeat the suit unless the party is indispensable; but the joining of a proper party (other than formal) will always spoil the case for the federal court.\*

*Proper and Necessary Parties.***§ 509. Proper Parties.**

In conformity with the general classification of parties adopted by the federal courts, we proceed to consider in detail the following sorts of parties: proper parties, formal and nominal parties, necessary parties, and indispensable parties.

A proper party, as distinguished from one whose presence is necessary to the determination of the controversy, is one who has an inter-

\* *Pittsburg etc. R. Co. v. Baltimore* Compare *Wilson v. Oswego Township etc. Co.* (1894) 10 C. C. A. 20, 61 Fed. (1894) 151 U. S. 56, 38 L. ed. 70, 14 705 (reversing (1893) 55 Fed. 701). Sup. Ct. 259.

est in the subject-matter of the litigation that may be conveniently settled therein.<sup>10</sup> In considering the propriety of joining particular persons as plaintiffs or defendants, it is to be borne in mind that one of the prime objects of the exercise of equitable jurisdiction is to prevent future litigation and to dispense with the necessity for a multiplicity of suits. This naturally leads to the rule that all should be joined who are interested in the subject-matter of the controversy.<sup>11</sup> One may be a proper party to a suit though no relief is prayed directly against him, since his presence may contribute to the granting of relief against others, or it may be desirable that he be joined in order to make the decree binding on him for the future. Little difficulty is experienced in determining who are proper parties in cases where we do not come in contact with the question of jurisdiction. The rule as to proper parties is liberal, and generally speaking doubts should be resolved in favor of joining the party.

#### § 510. Necessary Parties.

The term "necessary" as applied to parties may perhaps be said to have a technical meaning in the federal courts. It is adopted from the equity practice of the chancery court as that court was formerly constituted. As originally used in that court, the term "necessary," when applied to parties, seems to have meant exactly what it purports to mean. To say that a particular party was necessary was as much as to say that the court would not proceed to judgment without him. In the federal courts, however, owing to their limited jurisdiction, another distinction is drawn, and necessary parties are divided into those that are only conditionally necessary and those that are absolutely necessary. Those parties who are conditionally necessary must be brought in if, being within the reach of the process of the court, they can be made parties without destroying the jurisdiction of the court. On the other hand, if they are beyond the reach of process, or, being within the reach of process, are such that their joinder would destroy the jurisdiction of the court, they may be omitted as parties,

<sup>10</sup> *Kelley v. Boettcher* (1896) 29 C. U. S. *v. Dastervignes* (1902) 118 Fed. C. A. 14, 85 Fed. 64; *Sioux City etc.* 199, *affirmed Dastervignes v. U. S. Co. v. Trust Co.* (1897) 27 C. C. A. 73, (1903) 58 C. C. A. 346, 122 Fed. 30; 82 Fed. 124, 49 U. S. App. 523. *Union Stock-Yards Nat. Bank v. Moore*

<sup>11</sup> *Mandeville v. Riggs* (1829) 2 Pet. (1897) 25 C. C. A. 150, 79 Fed. 705; 492, 7 L. ed. 493; *Jones v. Bolles* (1869) *Hibernia Ins. Co. v. St. Louis, etc.* 9 Wall. 364, 19 L. ed. 734; *Howe & Transp. Co.* (1882) 10 Fed. 596, *affirmed Davidson Co. v. Haugan* (1904) 140 (1887) 7 Sup. Ct. 550, 120 U. S. 166, Fed. 182; *Hubbard v. Manhattan Trust* 30 L. ed. 621. Co. (1896) 30 C. C. A. 520, 87 Fed. 51;



being only conditionally necessary. It is to this class of parties that the term "necessary" appears to be most commonly applied. "Necessary" as used of parties in the federal courts therefore means "conditionally necessary." To those parties who are absolutely and unconditionally necessary the term "indispensable" is applied. It is not to be supposed that usage on this point is settled and unfluctuating. In fact we find that the word "necessary" is not infrequently used in the sense of unconditionally necessary, or indispensable;<sup>12</sup> but according to the best usage the expression "necessary parties" refers to those that are so far proper and desirable as parties that the court will require them to be joined if this can be done without destroying jurisdiction over the cause. The cases cited below furnish illustrations of situations where parties have been held to be necessary. No doubt in some of these cases the same parties would have been considered indispensable also, if the question had been raised.<sup>13</sup>

It will be noted that the question whether a particular person is a proper party to a suit and the question whether he is a necessary party often merely present different aspects of the same controversy. If a certain person is joined as a party and objection is made on the ground that he ought not to be joined, the question to be determined is whether he is a proper party. On the other hand, if a particular party is omitted from the bill and objection is made that he ought to be joined, then the question to be determined is whether he is a necessary party. It is obvious that "proper party" is broader and more inclusive than the term "necessary party."<sup>14</sup>

### § 511. Illustrations of Necessary Parties.

In a suit for contribution all who are liable to contribute should be made parties if they can be reached and brought in without ousting

<sup>12</sup> In *Perkins v. Hendryx* (1906) 149 Fed. 528, the court gives a definition of a necessary party which in terms clearly imports that the party is absolutely necessary, or indispensable. "Necessary parties are those whose absence would leave the controversy in such a condition that its final determination would be impossible, or highly inconsistent with equity and good conscience." Yet in the same connection, the definition is so qualified as to indicate that the court is referring to parties that are only conditionally necessary, for it is said: "They ought to be joined if they are in the jurisdiction."

<sup>13</sup> *Coiron v. Millaudon* (1856) 19 How. 113, 15 L. ed. 575; *Billings v. Aspen, etc. Co.* (1892) 51 Fed. 338; *Newman v. Schwerin* (1894) 61 Fed. 865, 10 C. C. A. 129; *Watson v. Bonfils* (1902) 116 Fed. 157, 53 C. C. A. 535; *Post v. Buckley* (1902) 119 Fed. 240; *Drake v. Delliker* (1895) 24 Fed. 527; *Sahlgard v. Kennedy* (1882) 13 Fed. 242.

<sup>14</sup> Officers of a corporation who act for it in the making of an *ultra vires* contract are not necessary parties though perhaps they might be deemed proper parties in a suit brought by the corporation to recover property received

jurisdiction.<sup>15</sup> In a bill for the specific performance of a contract, the parties to the contract are usually the only necessary parties.<sup>16</sup>

The bill to quiet and establish title to land is somewhat analogous to the legal action of ejectment at law, at least in respect of the fact that the requirement as to the making of necessary parties to such suits is about the same in both. For instance, in the ejectment suit, the plaintiff need only make such persons defendants as are actually in possession and claiming adversely to him. So, in the equitable proceeding, he can get along without joining any as parties other than the one who asserts the title constituting the cloud and those in privity with him.<sup>17</sup>

### § 512. When Cestui Que Trust Necessary.

In suits brought by or against trustees respecting the trust property, the *cestui que trust* is as a general rule a necessary party. But a trustee who merely sues to reduce the property to his possession or to protect his title as trustee, without in any way affecting his relations with the *cestui que trust*, need not make the latter a party defendant.<sup>18</sup> Where a trustee is made a party to a foreclosure suit by bondholders suing in behalf of themselves and others similarly situated, the bondholders who do not join in the suit are not necessary parties. So, if such trustee files a foreclosure suit, whether it be by an original or a cross bill, it is not necessary that the beneficiaries should be made defendants. In all such cases, whether the trustee be a plaintiff or a defendant, he stands for and represents all the beneficiaries who, though not actual parties, will be concluded by the decree, unless it is impeached for fraud or collusion between him and the adverse party.<sup>19</sup>

### § 513. When Trustee Necessary.

In a suit against the beneficiary of a trust created by deed of conveyance, the object of the suit being to have the conveyance set aside as fraudulent and void, the trustee named in the deed is a

and held by the other party to the in- Hopkirk v. Page (1822) Fed. Cas. No. valid contract. Pioneer Gold Min. Co. 6,697.  
v. Baker (1884) 20 Fed. 4.

<sup>15</sup> Mandeville v. Riggs (1829) 2 Pet. 482, 7 L. ed. 493. <sup>16</sup> Toler v. East Tennessee, etc. Ry. Co. (1894) 67 Fed. 168, 171; Kerrison v. Stewart (1876) 93 U. S. 155, 23 L.

<sup>17</sup> Cella v. Brown (1906; C. C. A.) ed. 843; Campbell v. Railroad Co. (1871) 1 Woods 376, Fed. Cas. No.

75 C. C. A. 608, 144 Fed. 742. <sup>18</sup> Miller v. Ahrens (1907) 150 Fed. 651. 2,366; Shaw v. Railroad Co. (1879) 100

<sup>19</sup> Carey v. Brown (1875) 92 U. S. U. S. 606, 25 L. ed. 757; Forbes v. Rail- 171, 23 L. ed. 469; Smith v. Portland road Co. (1872) 2 Woods 334, Fed. Cas. (1887) 30 Fed. 734. Compare Upham No. 4,926; Richter v. Jerome (1887) v. Brooks (1848) Fed. Cas. No. 16,796; 123 U. S. 233, 31 L. ed. 182.

necessary party.<sup>20</sup> But where a bill is filed against a trustee for an accounting of gains and profits, co-trustees who did not share in such gains and profits and who are not sought to be held liable for any part thereof are not necessary parties to the bill, or at least they are dispensable.<sup>21</sup>

#### § 514. Who Is Real Party in Interest.

Whether the trustee or the beneficiary whom he represents is a real party in interest must depend on the facts of the case, and it may well happen that both trustee and beneficiary are necessary or even indispensable parties. Under varying circumstances both these sorts of parties have been held to be formal or necessary parties as the facts seemed to warrant.<sup>22</sup>

#### § 515. When Bill Demurrable for Absence of Necessary Party.

Before a bill becomes demurrable for the non-joinder of necessary parties it must show clearly on its face that the absent parties have an interest to be affected by the decree which requires their joinder. In a case where this fact is not made to appear in the bill the suit will proceed; and if, during the litigation, it develops that absent parties will be affected by the relief sought, the court will make an order to bring them in, or the case can be otherwise dealt with as circumstances require.<sup>23</sup>

#### § 516. Plea or Answer Raising Question of Want of Parties.

Plea or answer is the proper means for raising the question of the non-joinder of necessary or indispensable parties, where the facts showing that they are such are not apparent on the face of the bill.<sup>24</sup>

<sup>20</sup> *O'Hara v. MacConnell* (1876) 93 728, 144 U. S. 457, 38 L. ed. 501; *Mass. U. S.* 150, 23 L. ed. 842. The non-joinder of a trustee is not available on demurrer unless the facts show that he has an interest capable of being affected by the decree. *Smith v. Lee* (1896) 77 Fed. 779.

<sup>21</sup> *Bay State Gas Co. v. Rogers* (1903) 147 Fed. 557.

*When Trustee Dispensable.*—*Anthony v. Campbell* (1901) 112 Fed. 212, 50 C. A. 195; *Einstein v. Georgia R. Co.* (1903) 120 Fed. 1008.

<sup>22</sup> *Rand v. Walker* (1898) 117 U. S. 340, 6 Sup. Ct. 769, 29 L. ed. 907; *Peper v. Fordyce* (1886) 119 U. S. 469, 7 Sup. Ct. 287, 30 L. ed. 435, reversing *Fordyce v. Peper* (C. C.; 1883) 18 Fed. 516; *Dodge v. Tulleys* (1892) 12 Sup. Ct. 728, 144 U. S. 457, 38 L. ed. 501; *Massachusetts, etc. Const. Co. v. Cane Creek* (1894) 15 Sup. Ct. 91, 158 U. S. 283, 39 L. ed. 152; *Barry v. Missouri, etc. R. Co.* (1886) 27 Fed. 1; *Earp v. Coleman* (1886) 28 Fed. 340; *Needham v. Wilson* (1891) 47 Fed. 97; *Shirk v. La Fayette* (1892) 52 Fed. 857; *Morris v. Lindauer* (1893) 4 C. C. A. 102, 54 Fed. 23; *Rust v. Brittle Silver Co.* (C. C. A.; 1893) 58 Fed. 611, 7 C. C. A. 389; *Shipp v. Williams* (C. C. A.; 1894) 62 Fed. 4, 10 C. C. A. 247; *Griswold v. Bachelier* (1896) 75 Fed. 470.

<sup>23</sup> *Farson v. City of Sioux City* (1901) 100 Fed. 278.

<sup>24</sup> *Story v. Livingston* (1839) 13 Pet. 359, 10 L. ed. 200.

**§ 517. Admission of New Parties at Hearing.**

A want of proper or necessary parties is not always fatal even at the hearing, because the cause may then be ordered to stand over to make further parties.<sup>25</sup> But this is rarely done unless the cause, as to the new parties, can stand on the bill and answer of such parties. If the new parties are to be allowed to litigate the whole suit over again, it is just as well to dismiss without prejudice in order that the suit may be begun anew.<sup>26</sup>

Leave having been given at the hearing to bring in necessary parties, it behooves the plaintiff to see that those parties are properly brought in. On the plaintiff's failure in this regard, the case should be dismissed, but without prejudice.<sup>27</sup>

**§ 518. Admission of Necessary Party by Consent.**

One who is a necessary party to a bill but who is not named as such may, with the consent of all the parties in the suit, come in and answer. If he does so he becomes to all intents and purposes a party to the bill and will be bound by the decree. The consent of the other parties to such a step will be inferred from their failure to make objection.<sup>28</sup>

*Indispensable Parties.***§ 519. Who Are Indispensable Parties.**

An indispensable party is one in whose absence the court will in no wise and under no conditions proceed to make a decree. A dispensable party, on the other hand, is one who, by the ordinary rules of equity practice, would be considered a proper or even necessary party, but who may nevertheless be omitted to save the jurisdiction of the court.

The test of the dispensability of a party is found chiefly in two considerations, (1) whether without that party a decree could be entered that would do justice between the parties before the court, and (2) whether, if a decree should be entered in the absence of that party, the interests of such absent party would be unduly prejudiced. In other words, the question must be determined by reference to the effect of

<sup>25</sup> *Hunt v. Wickliffe* (1829) 2 Pet. 201, 7 L. ed. 397; *Morgan v. Morgan* 201, 7 L. ed. 397.  
(1817) 2 Wheat. 298, 4 L. ed. 244.

<sup>26</sup> *Anderson v. Watt* (1891) 138 U. S. 694, 705, 34 L. ed. 1078, 1082.  
<sup>27</sup> *Story, J. in West v. Randall* (1820) 694, 705, 34 L. ed. 1078, 1082.  
<sup>28</sup> *Mason*, 200.

the suit on the rights both of the absent party and of the parties actually before the court.<sup>29</sup>

An indispensable party has been otherwise defined as one who has such an interest in the subject-matter of the controversy that a final decree between the parties before the court cannot be made without injuriously affecting his interests or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience.<sup>30</sup> Any party who has an interest to be directly affected by the suit is indispensable.<sup>31</sup>

### § 520. How Interest of Absent Party Affected by Decree.

The fact that an absent party would not be bound or concluded by a decree does not prove that he is dispensable. The question is whether his interests would be so far affected by the decree as to make it improper for the court of equity in the exercise of a fair discretion to proceed without him. If so, he is indispensable.<sup>32</sup> In conformity with this, it has been decided that where a suit in equity is concerned with the disposal of a fund or other property and the decree sought would, or might, operate to sweep that property away, so as to put it beyond the reach of one having an interest in it, the person having that interest is always an indispensable party. The rule is not quite so strict where the question is one of mere personal liability and the disposition of a fund is not in issue.<sup>33</sup>

*West v. Randall* (1820) 2 Mason 181: In this case Story, J., went into a very full and elaborate discussion of the principles underlying the law of parties in equity. The fact that most of this discussion was not necessary to the decision does not impair its value as an exposition of general doctrine.

The bill was here brought by an heir at law and distributee of the estate of one William West against certain trustees to whom the decedent had conveyed real and personal property in trust for the payment of debts. An accounting was sought and also recovery of an eleventh part of the surplus. It was held that other heirs and distributees having a similar interest with the plaintiff were necessary parties. But as they could not be joined as plaintiffs without ousting jurisdiction and as there was no adversity of interest such as would necessitate

<sup>29</sup> *Horn v. Lockhart* (1873) 17 Wall. (C. C. A.; 1907) 83 C. C. A. 380, 154 570, 21 L. ed. 657; *Cameron v. McRoberts* (1818) 3 Wheat. 591, 4 L. ed. 467.

<sup>30</sup> *Mallow v. Hinde* (1827) 12 Wheat. 183, 6 L. ed. 599; *Shields v. Barrow* (1854) 17 How. 130, 15 L. ed. 158; *Inbusch v. Farwell* (1861) 1 Black 566, 17 L. ed. 188; *Barney v. Baltimore* (1867) 6 Wall. 280, 18 L. ed. 625.

<sup>31</sup> *Arkansas Southeastern R. Co. v. Union Sawmill Co.* (C. C. A.; 1907) 83 C. C. A. 224, 164 Fed. 304.

<sup>32</sup> *California v. Southern Pac. Co.* (1894) 157 U. S. 229, 39 L. ed. 683.

<sup>33</sup> *Williams v. Bankhead* (1873) 19 Wall. 563, 22 L. ed. 184.

<sup>30</sup> *Rogers v. Penobscot Mining Co.*

their being joined as defendants, it was ruled that they could be dispensed with altogether. Furthermore it was held that, as the suit sought the recovery of a distributive share, the personal representative of the decedent was a necessary and indispensable party.

In discussing the rule that courts of equity will dispense with parties who are not absolutely indispensable when they cannot be reached or when joining them would oust jurisdiction, the learned judge said: "This rule is peculiarly applicable to the courts of the United States; and, therefore, if a party, who might otherwise be considered material, by being made a party to the bill, would from the limited nature of its authority oust the court of its jurisdiction, . . . I should struggle to administer equity between the parties properly before us, and not suffer a rule founded on mere convenience and general fitness, to defeat the purposes of justice."<sup>34</sup>

### § 521. Illustrations of Indispensable Parties.

The following concrete cases furnish ample illustration of situations where it has been held that particular parties were indispensable. The general principle recognized in these cases is that where a suit cannot be entertained and a decree made in respect to the interests before the court without doing manifest injustice to interested parties who are not and cannot be brought before the court, the suit will be dismissed.<sup>35</sup>

1. *Mallow v. Hinde* (1827) 12 Wheat. 193, 6 L. ed. 599: In a bill to enjoin a judgment at law obtained in an ejectment suit, it appeared that the plaintiff's equitable rights on which the suit depended were derived from executory contracts with persons who could not be brought in, and the situation was such that relief could not be granted unless the court could in effect grant a decree for the specific performance of those contracts as against such absent parties. It was held that these parties were indispensable, and the suit was dismissed.

2. *Shields v. Barrow* (1854) 17 How. 130, 15 L. ed. 156: A suit was brought

<sup>34</sup> (1890) 2 Mason 196.

<sup>35</sup> *Wilson v. Oswego Tp.* (1894) 151 U. S. 56, 38 L. ed. 70; *Eldred v. American Palace-Car Co.* (1900) 44 C. C. A. 554, 105 Fed. 457; *Cabaniss v. Reco Min. Co.* (1902) 54 C. C. A. 190, 116 Fed. 318; *Raphael v. Trask* (1902) 118 Fed. 777; *Evans v. Gorman* (1902) 115 Fed. 399; *Morgan v. Morgan* (1817) 2 Wheat. 290, 4 L. ed. 242; *Fourth Nat. Bank v. New Orleans, etc. R. Co.* (1870) 11 Wall. 624, 20 L. ed. 82; *McDonnell v. Eaton* (1883) 18 Fed. 710; *Bedilian v. Seaton* (1860) Fed. Cas. No. 1,218; *Taylor v. Holmes* (1882) 14 Fed. 498, affirmed (1888) 8 Sup. Ct. 1192, 127 U. S. 489, 32 L. ed. 179; *Walsh v. Memphis, etc. R. Co.* (1881) 6 Fed. 797; *Watson v. Evers* (1882) 13 Fed. 194; *First Nat. Bank v. Smith* (1879) 6 Fed. 215; *First Nat. Bank v. Bigelow* (1870) 6 Fed. 215; *Dormitzer v. Illinois, etc. Bridge Co.* (1881) 6 Fed. 217; *Rich v. Bray* (1889) 2 L.R.A. 225, 37 Fed. 277; *Bland v. Fleeman* (1887) 29 Fed. 669, (criticized in *Belding v. Gaines* (1887) 37 Fed. 817); *Ward v. San Diego Land, etc. Co.* (1897) 79 Fed. 685; *Consolidated Water Co. v. Babcock* (1896) 76 Fed. 243; *Shingleur v. Jenkins* (1901) 111 Fed. 452; *Stewart v. Dunham* (1885) 5 Sup. Ct. 1163, 115 U. S. 61, 29 L. ed. 329; *Mangels v. Donau Brewing Co.* (1892) 53 Fed. 513; *Arapahoe County v. Kansas Pac. R. Co.* (1877) Fed. Cas. No. 502; *Wilson v. City Bank* (1838) Fed. Cas. No. 17,797.

to rescind a compromise agreement and restore the plaintiff to his rights under his original contract for the sale of land and slaves. The court had jurisdiction of some of the parties to the compromise agreement and these were properly brought into the suit as defendants. But there were other parties to the agreement over whom the court had no jurisdiction and who accordingly could not be brought into the suit. It was held that these parties were indispensable, and because of their absence the bill was dismissed. Obviously, it is not proper for a court of equity to undertake to decree a rescission of a contract as against some, while leaving it in full operation against others occupying precisely the same relation to the contract. The contract was one entire and indivisible subject, and all the parties to the contract were indispensable parties to the suit in which it was sought to rescind it.

3. *Barney v. Baltimore* (1867) 6 Wall. 290, 16 L. ed. 825: In a case where a bill was filed for a partition of real estate and for an accounting, it was held that all of the persons having an interest in the property as tenants in common were indispensable parties. Accordingly, the suit was dismissed, some of those parties being beyond the jurisdiction of the court. It was said: "If the decree should partition the land and state an account, the particular pieces of land allotted to the parties before the court would still be undivided as to these parties, whose interest in each piece would remain as before the partition. And they could at any time apply to the proper court, and ask a repartition of the whole tract, unaffected by the decree in this case, because they can be bound by no decree to which they are not parties."

4. *Bank v. Carrollton Railroad* (1870) 11 Wall. 624, 20 L. ed. 62: One who came into the right of a partner by assignment of such partner's interest in the firm filed a bill to enforce the transfer and determine his interest. It was held that, as the only interest actually acquired by such assignee was an interest in the surplus after an accounting of the partnership affairs, all the partners were indispensable.

5. *Ribon v. Railroad Companies* (1872) 16 Wall. 446, 21 L. ed. 367: A suit was brought by dissenting bondholders and stockholders of a railroad company to set aside a collusive foreclosure sale under a mortgage on the property of the company at which sale another road had become purchaser. The two railroad companies were made defendants but the trustees of the mortgage which was foreclosed were not. It was held that they were indispensable. It was also held that all, or rather some as representative of all, of the bondholders who participated in the distribution of the proceeds of the sale should have been joined, because the question of their liability to refund would arise if the sale were impeached. Said the court: "Where a decree can be made as to those present without affecting the rights of those who are absent, the court will proceed. But if the interests of those present and of those absent are inseparable, the obstacle is insuperable." \*\*

6. *Davenport v. Dows* (1873) 18 Wall. 626, 21 L. ed. 938: In a suit by a shareholder suing in the right of his corporation, the corporation was held to be an indispensable party. Said the court: "Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an

\*\* *Evans v. Faxon* (1882) 11 Bism. 178, 10 Fed. 314.

incidental benefit from it. It would be wrong, in case the shareholder were unsuccessful, to allow the corporation to renew the litigation in another suit, involving precisely the same subject-matter. To avoid such a result, a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation."<sup>17</sup>

7. *Kendig v. Dean* (1878) 97 U. S. 423, 34 L. ed. 1061: The bill alleged that the defendant, while in possession and control of the books of a corporation, had wrongfully caused certificates of stock belonging to the plaintiff to be entered in the books of the company as having been transferred to himself. It was prayed that the stock be restored in the books of the company in the plaintiff's name. It was held that the corporation was an indispensable party since such a decree could not be made effective unless it was brought before the court.

8. *Gregory v. Stetson* (1890) 133 U. S. 579, 33 L. ed. 792: Two promissory notes were left with a depository subject to the joint order of the two depositories, and to be dealt with as they might direct. The depositories were attorneys respectively for two other persons beneficially interested in the notes. One of these persons beneficially interested afterwards filed a bill against the depository to compel him to turn over the proceeds, alleging that he (the plaintiff) had, as a result of certain arbitration proceedings, become entitled to the whole. It was held that the other of the original beneficial owners and the two attorneys, depositories, were indispensable parties. In this case the court quoted with approval the rule as to necessary parties stated by Judge Story as follows: "It is a general rule in equity (subject to certain exceptions, which will hereafter be noticed) that all persons materially interested, either legally or beneficially, in the subject-matter of a suit are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all. By this means, the court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others, who are interested in the subject-matter, by a decree which might otherwise be grounded upon a partial view only of the real merits."<sup>18</sup>

9. *New Orleans etc. Co. v. New Orleans* (1896) 164 U. S. 471, 41 L. ed. 618: A water company having the exclusive privilege of supplying water to the city of New Orleans and its inhabitants filed a bill, alleging that the city, in violation of the plaintiff's rights, had passed sundry special ordinances permitting and authorizing various individuals and corporations to bring water into the city. It was sought to have these ordinances declared void. It was held that the licensees and beneficiaries under the ordinances were indispensable parties.

10. *Equitable Life Assurance Soc. v. Patterson* (1880) 1 Fed. 127: An insurance company filed a bill against the insured to cancel a policy. The policy provided that in the event of the death of the insured, the money should be paid to his wife, but if she were then dead to his children. It was held that these children as well as the wife were indispensable parties.

<sup>17</sup> *Holton v. Wallace* (1895) 66 Fed. 409 (1896) 77 Fed. 61, 23 C. C. A. 71; *Story, Eq. Pl., sec. 72; West v. Randall* (1820) 2 Mason 190. *Groel v. United Electric Co.* (1904) 132 Fed. 252.

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11. *Bell v. Donohoe* (1883) 8 Sawy. 435: A stockholders suit was brought to set aside transactions by which property of the corporation had been fraudulently conveyed. The chief actors in these alleged fraudulent transactions were members of a partnership. The title sought to be vacated was nominally in one of these partners but it was held for the benefit of the firm. It was held that all the partners were indispensable, and Sawyer, J., observed that it is "difficult to see how partnership rights can be finally determined as to anybody without the presence of all the partners."

12. *Conolly v. Wells* (1887) 33 Fed. 205: A bill for accounting against two executors. It appeared that there was a third executor who was not joined because not within the jurisdiction of the court. All three executors had united in the probate of the will, all had assumed the trusts imposed on them by the will, and all had acted as representatives of the estate. It was held that this third executor was indispensable, and the suit was dismissed. Said the court: "The claim is one that affects the estate in its entirety. The bill seeks to establish a demand against an estate which in law is in the joint possession of all the executors, and who are all actively engaged in administering that estate. The interest and authority of all are joint and entire. They have a joint possessory and trust interest in the assets of the estate. The interest of one executor is inseparable from that of the others. One and all have the right to contest the complainant's demand. The litigation involves a fund which is legally vested in each executor, and each is a necessary party to an accounting which affects that fund." \*\*

13. *Jessup v. Illinois Cent. R. Co.* (1888) 36 Fed. 735: In a suit against a railroad company to compel it to operate another line for forty years under a lease which the defendant had assumed, it appeared that the result of the suit would turn upon the interpretation of the lease. One of the original parties to the lease was another railroad company, and any adjudication on the effect of the lease would affect its right equally with that of the defendant company. It was held that this original party to the lease was indispensable.

14. *Chadbourne v. Coe* (1892) 2 C. C. A. 327, 51 Fed. 479 (1891) 45 Fed. 822: The plaintiff, who was the creditor of one W. by certain notes of hand, filed a bill in the federal court of Minnesota to subject real property in that state which was alleged to have been fraudulently conveyed by a trust agreement from W. to one Coe. W. was alleged to be insolvent, and his citizenship was such that he could not be forced to come in. It was held that he was an indispensable party to the suit brought against Coe as fraudulent transferee. Said the court: "A creditor cannot maintain a bill to establish a debt against his alleged debtor, to annul the debtor's conveyances and contracts, and appropriate his property and money to the payment of the creditor's alleged debt, without making the debtor a party to a bill seeking such relief."

15. *Chaffin v. Hull* (1892) 49 Fed. 524, (1893) 4 C. C. A. 414, 54 Fed. 437: The expectancy of a contingent remainderman who is not an actual party to a suit cannot be cut off and extinguished when there is no one before the court to represent him but a trustee whose trust has been executed under the statute of uses and a life-tenant whose estate is to be made an estate in fee by the expected decree. "In every case there must be such parties before the court to insure a fair trial of the issue in behalf of all."

\*\* *Blake v. McKim* (1890) 103 U. S. 336, 26 L. ed. 563.

16. *Averill v. Southern Ry. Co.* (1896) 75 Fed. 736: A bill was filed to enjoin a rate war inaugurated by two systems of railroads. The G. company was made a defendant in order that it might be enjoined from carrying goods at the rates fixed by another company, one of the principal offenders. The return of the G. company to a rule to show cause why an injunction should not issue made it appear that the G. company was not operating any road, but that it had leased its lines to two other companies for a term of years, and that these companies were operating the lines. It was held that these two operating companies, the lessees, were indispensable parties. By the contract of lease, the lessor company had bound itself to give control of its rates to the lessee companies, and any order of the court concerning the rates would naturally affect the interests of the lessee companies under the lease.

The holders of the legal title to land are indispensable parties in a suit to annul that title.

1. *United States v. Winona etc. R. Co.* (1895) 15 C. C. A. 96, 67 Fed. 948: The United States filed a bill against a railroad and certain of its grantees to set aside a certification of land to the state of Minnesota and to annul conveyances made by the state to the company. It was held that *bona fide* purchasers from the company were indispensable parties.

2. *Detweiler v. Holderbaum* (1890) 42 Fed. 337: In a bill to foreclose a mortgage executed by an executor on the lands of his testator, the living children of the testator were made parties, but two grandchildren, being children of a deceased daughter, were not. These grandchildren took a twelfth interest in that property by the will. It was held that they were indispensable parties. The mortgage covered the whole property and every interest in it. Consequently, if the mortgage were upheld and foreclosed, the interest of those parties would have been cut off. Even if they were not so bound, a cloud would be cast on their title by the foreclosure.

3. *McConnell v. Dennis* (C. C. A.; 1907) 153 Fed. 547: One McCready claimed to be the owner in fee of mining property and as such leased the mining rights to McConnell under a contract reserving rent and providing for royalties to be paid on gas and oil taken from the premises. Another person also claimed to be owner of the premises and he executed a lease thereon to one Dennis. The latter then brought suit to enjoin McConnell from conducting mining operations on the premises. It was held that the defendant's lessor, McCready, was an indispensable party, since an injunction against the defendant prohibiting him from mining there would effectually destroy the royalty rights secured to McCready by his lease.

### § 522. Bill Dismissed Where Indispensable Party Wanting.

Where the court for any reason cannot reach or exercise jurisdiction over an indispensable party, the suit will be dismissed without regard to the circumstance from which the disability proceeds. In most cases the disability is due to the citizenship of such party. But it is the same where the disability results merely from inability to get

process served, or from the character of the party as a state of the Union.

1. *Sloan Land and Cattle Co. v. Frank* (1893) 148 U. S. 603, 37 L. ed. 577: A corporation engaged in the cattle business sold all its lands and herds to another company and received in payment large sums of money and certain stock. The vendor corporation then distributed the proceeds among its stockholders and went out of business. No assets were left. The vendee company took possession of the properties purchased by it and soon found that it had been grossly defrauded. Representations by which the sale was accomplished proved to be false. The vendee then brought suit in equity against the stockholders of the vendor corporation individually and sought to compel them to disgorge enough of the proceeds received by them to satisfy the plaintiff's claim for damages. The vendor corporation was not made a party, and it was sought to excuse this step by alleging in the bill that said corporation had abandoned its franchises and there was no officer or agent of it on whom process could be served. It was, however, held that the corporation was not in law dissolved and that it was an indispensable party. And in regard to the allegation that there was no person on whom process could be served to bring that corporation into court, it was said: "It does not help the matter that complainant could not get the vendor corporations before the circuit court for the Northern District of Illinois. That fact in no way affects the question of their being necessary parties, without whose presence no decree could be rendered against the appellees."

2. *Christian v. Atlantic etc. R. Co.* (1890) 133 U. S. 233, 33 L. ed. 589: The holder of bonds of a railroad company sought to subject to the payment of the bonds certain certificates of stock and dividends accrued thereon held by the state of North Carolina, it being insisted that plaintiff's bonds were a lien on those certificates of stock. It was held that the state was an indispensable party inasmuch as it was sought by the bill to seize and appropriate certificates and dividends to which the state held the legal title. As the state was not suable, jurisdiction failed and the suit was dismissed.<sup>40</sup>

3. *Cunningham v. Macon etc. R. Co.* (1883) 109 U. S. 446, 27 L. ed. 992: A first mortgage on a railroad was foreclosed and the property was bought in by the state of Georgia, and legal title was thereby vested in it. A bill was subsequently filed by the holders of second mortgage bonds to set aside the previous sale and to foreclose their own mortgage. It was held that the state was an indispensable party, and as the court had no jurisdiction over it, the suit was dismissed.

Where an indispensable party is dismissed on the ground that, by reason of citizenship, such party is not subject to be sued in the court where suit was brought, the whole case fails; and the entire suit must be dismissed, but without prejudice.<sup>41</sup>

<sup>40</sup> Compare *South Dakota v. North Carolina* (1904) 192 U. S. 286, 351, 48 L. ed. 448, 474, <sup>41</sup> *United States v. Northern Pac. R. Co.* (C. C. A.; 1905) 67 C. C. A. 269, 134 Fed. 715.

**§ 523. Parties Dispensable as to Particular Relief.**

If a bill prays for special relief that cannot be granted because of the absence of parties whose interest would be adversely affected by such relief, other relief may be granted under the general prayer, provided the state of the pleadings justifies dispensing with the absent parties in respect to such general relief.

*Davis v. Davis* (1898) 89 Fed. 532: A will was contested and, by a compromise agreement, was allowed to stand. One of the interested parties brought a suit against another seeking to have the compromise agreement set aside and praying for general relief. All of the parties to the agreement were not joined. It was held that all these parties were indispensable in so far as the special relief indicated was sought. But it appeared that under the general prayer the plaintiff was entitled, as against the parties before the court, to have his interest determined in respect to the shares received by the defendants before the court. The bill was accordingly sustained in this aspect.

Likewise, in any case, if it appears that the relief can be so moulded, under the facts stated and under the prayer, as not to affect an absent party, the suit will be retained and the party will be treated as a dispensable party as regards that relief.

1. *Cole etc. Mining Co. v. Virginia etc. Water Co.* (1871) 1 Sawy. 635: This was a suit to prevent a diversion of water of which the plaintiff claimed to be owner by discovery and prior appropriation. The water or, what is the same thing, the exclusive use of it, was the matter in controversy. One G. was interested in the tunnel by means of which the water was diverted but was not interested in the water itself. It was held that he did not have an interest in the controversy, or object of the suit, so interwoven with the interest of the other defendants that a decree affecting their interest would also affect his. Hence he was held to be dispensable (being out of the jurisdiction of the court). The court observed that if the only decree that could be rendered should require the tunnel to be filled up, then such decree would affect the interest of G. and could not be entered. But an expedient was suggested by which the decree could be so framed as to give relief without disturbing the tunnel. Accordingly the motion to dismiss for nonjoinder of such party was refused. Said Mr. Justice Field: "In a case of this kind when the absent person alleged to be interested would, if brought into court,oust its jurisdiction, I should follow the course suggested by Mr. Justice Story in *West v. Randall* and strain hard to give relief as between the parties before the court."

2. *Canal Co. v. Gordon* (1867) 6 Wall. 561, 18 L. ed. 894: Two partners, as contractors, did work on a flume for a canal company. The company violated its contract and a cause of action thereby accrued to the contractors to enforce their lien. One of the contractors fraudulently released this cause of action in the name of the firm for a very small consideration in cash. The other contractor subsequently filed a bill to enforce the lien. It was held that as the

company was affected with the fraud, the release was unavailing, yet it was so far given effect as to operate as a severance of the interests of the partners, and it thus made the releasing partner dispensable.

*Improper, Unnecessary, and Dispensable Parties.*

**§ 524. What Parties Are Dispensable.**

The following cases present situations where it was held that the person or persons who were not made parties to the bill were not necessary or proper parties to the suit or, if so, were dispensable, so that the omission of them was held to be right.<sup>42</sup>

1. *Elmendorf v. Taylor* (1825) 10 Wheat. 152, 6 L. ed. 289: In a bill to compel a conveyance of land the defendant insisted that there were certain parties not joined, who were tenants in common with the plaintiff in respect of the interest about which suit was brought. But it was shown that those parties were entitled to a fourth part, not of the whole tract, but of a specifically defined portion of it, and it did not appear that such portion interfered with the part occupied by the defendants. It was held that the bill was maintainable. Said the court: "Courts of equity require that all the parties concerned in interest shall be brought before them that the matter in controversy may be finally

<sup>42</sup> *Simms v. Guthrie* (1815) 9 Cranch 19, 3 L. ed. 642; *Mandeville v. Riggs* (1829) 2 Pet. 482, 7 L. ed. 493; *Vattier v. Hinde* (1833) 7 Pet. 252, 8 L. ed. 675; *Williams v. U. S.* (1891) 138 U. S. 514, 11 Sup. Ct. 457, 34 L. ed. 1026; *McGahan v. National Bank* (1895) 156 U. S. 218, 15 Sup. Ct. 347, 39 L. ed. 403; *Cherokee Nation v. Hitchcock* (1902) 187 U. S. 294, 23 Sup. Ct. 115, 47 L. ed. 183; *Stewart v. Chesapeake, etc. Canal Co.* (1890) 1 Fed. 361; *Deford v. Mehaffy* (1882) 14 Fed. 181; *Hazard v. Durant* (1884) 19 Fed. 471; *Patrick v. Isenhart* (1884) 20 Fed. 339; *Phelps v. Elliott* (1886) 29 Fed. 53, *appeal dismissed* (1891) 140 U. S. 694, 11 Sup. Ct. 1028, 35 L. ed. 745; *Belding v. Gaines* (1887) 37 Fed. 817 *criticising* *Bland v. Fleeman* (1887) 29 Fed. 669; *Hamilton v. Savannah, etc. R. Co.* (1892) 49 Fed. 412; *Billings v. Aspen Min., etc. Co.* (C. C. A.; 1892) 2 C. C. A. 252, 51 Fed. 338, 3 C. C. A. 69, 52 Fed. 250; *Gudger v. Western N. C. R. Co.* (1894) 21 Fed. 81; *Hewitt v. Storey* (1889) 39 Fed. 719; *New York v. New Jersey Steamboat Transp. Co.* (1885) 24 Fed. 817; *Armstrong v. Savannah Soap Works* (1892) 53 Fed. 124; *Bellows v. Sowles* (1892) 52 Fed. 528; *U. S. v. Hendy* (1893) 6 C. C. A. 10, 54 Fed. 447; *Hicklin v. Marco* (1893) 56 Fed. 549; *Smith v. Lee* (1896) 77 Fed. 779; *Putnam v. Timothy Dry Goods, etc. Co.* (1897) 79 Fed. 454; *Union Mill, etc. Co. v. Dangberg* (1897) 81 Fed. 73; *Seccomb v. Wurster* (1897) 83 Fed. 856; *Bickford v. McComb* (1898) 88 Fed. 428; *Davis v. Davis* (1898) 89 Fed. 532; *International Trust Co. v. T. B. Townsend Brick, etc. Co.* (C. C. A.; 1899) 37 C. C. A. 396, 95 Fed. 850; *Cleveland Tel. Co. v. Stone* (1900) 106 Fed. 794; *Central R., etc. Co. v. Farmers' Loan, etc. Co.* (1901) 112 Fed. 81, *affirmed* (C. C. A.; 1902) 52 C. C. A. 149, 114 Fed. 263; *Anthony v. Campbell* (C. C. A.; 1901) 50 C. C. A. 195, 112 Fed. 212; *Williams v. Crabb* (C. C. A.; 1902) 117 Fed. 193, 59 L.R.A. 425, 54 C. C. A. 213; *Mackay v. Gabel* (1902) 117 Fed. 873; *Hunter v. Robbins* (1902) 117 Fed. 920; *Edwards v. Mercantile Trust Co.* (1903) 124 Fed. 381; *Bowker v. Haight* (1905) 140 Fed. 794; *Fidelity, etc. Co. v. Fidelity Trust Co.* (1906) 143 Fed. 152; *Cole Silver Min. Co. v. Virginia, etc. Water Co.* (1871) Fed. Cas. Nos. 2,989, 2,990; *Drake v. Goodridge* (1868) Fed. Cas. No. 4,062; *Harrison v. Urann* (1840) Fed. Cas. No. 6,146; *Jewett v. Cunard* (1847) Fed. Cas. No. 7,310; *Joy v. Wirtz* (1806) Fed. Cas. No. 7,554.

settled. This equitable rule, however, is framed by the court itself, and is subject to its discretion. It is not, like the description of parties, an inflexible rule, a failure to observe which turns the party out of court, because it has no jurisdiction over his cause; but, being introduced by the court itself, for the purposes of justice, is susceptible of modification for the promotion of those purposes."<sup>43</sup>

2. *Ogilvie v. Knox Ins. Co.* (1859) 22 How. 380, 16 L. ed. 349: A creditors' bill was filed by judgment creditors against an insolvent corporation and some of its stockholders. It was sought to enforce the liability of the latter on their stock subscriptions and to apply such assets to the payment of plaintiff's debts. The defendant stockholders objected that other stockholders equally liable with themselves were not joined as defendants. But it was held that they were dispensable.

3. *Keller v. Ashford* (1890) 133 U. S. 610, 33 L. ed. 667: The owner of land subject to a mortgage conveyed the same to one Ashford who, by the terms of the deed to him, assumed the payment of the mortgage debt. The mortgagee subsequently sued Ashford and asked for a judgment for the amount of the indebtedness and for general relief. The mortgagor was not made a party, but he was held not to be necessary. "The omission to make him a party cannot prejudice any interest of his, or any right of either party to this suit."

4. *Fisher v. Hampshire* (1893) 147 U. S. 133, 37 L. ed. 109: A bill was filed to enforce a vendor's equitable lien on land. Pending the suit the vendee conveyed to L. whose joinder would have destroyed jurisdiction. It was held that while L. was a proper party yet he was dispensable, and the suit proceeded without him.

5. *Sioux City etc. R. Co. v. Trust Co.* (1897) 27 C. C. A. 73, 82 Fed. 124 (1899) 173 U. S. 99, 43 L. ed. 628: The trust company filed a bill as trustee for bondholders to foreclose a first mortgage on the property of a terminal company. Certain banks held judgment liens on the mortgaged property later in date than the mortgage and inferior in equity to the rights created by the same. It was held that these banks were dispensable parties. Said the court: "They were not indispensable parties to the suit, because their interests were separable from those of the other parties to it, and a final decree which would do complete justice between them might be rendered without immediately affecting the interests of these banks. A decree of foreclosure in a suit to which they were not parties would have left their liens upon the equity of redemption unforced and unaffected."

6. *Stephen v. Beall* (1874) 22 Wall. 329, 22 L. ed. 786: One of four joint tenants of land having mortgaged his interest, a bill was afterwards filed to foreclose the mortgage. It was held that the other tenants were not proper or at least were not necessary parties. Nor was the situation changed by the fact that the mortgage in question purported to convey the whole estate. Its effect was merely to convey the interest of the grantor, and it created no cloud on the title of the other tenants such as would justify joining them.

7. *Hotel Co. v. Wade* (1877) 97 U. S. 13, 24 L. ed. 917: The holder of bonds secured by a mortgage on hotel property filed a bill to foreclose the same. It was held that other holders of similar bonds were not indispensable parties, and that they could be omitted if their joinder would defeat jurisdiction. It

<sup>43</sup> *Cameron v. M'Roberts* (1818) 3 Wheat. 591, 4 L. ed. 467.

was pointed out that such parties could intervene and the case would be opened so that they might come in and participate in the fund.

8. *South Dakota v. North Carolina* (1904) 192 U. S. 286, 48 L. ed. 448: South Dakota held bonds secured by a mortgage executed by the state of North Carolina on certificates of railroad stock. These certificates were in the possession of North Carolina. There was a separate mortgage of ten shares of stock for each bond. In a bill brought to foreclose the mortgage, it was held that other bondholders whose bonds were of the same series were dispensable as plaintiffs and that they were improper parties when joined as defendants.

9. *Union Mill etc. Co. v. Dangberg* (1897) 81 Fed. 73: One of several tenants in common of water rights brought a bill to enjoin a diversion of water. It was held that it was not necessary to join his cotenants as plaintiffs. "Complainant's interest is several. There is but a unity of possession. Its estate is capable of being injured and it is entitled to have it protected from irreparable injury without regard to the action of its cotenants. The cotenant is not an indispensable party to the determination of its rights."<sup>44</sup>

10. *Donovan v. Campion* (C. C. A.; 1898) 29 C. C. A. 30, 85 Fed. 71: Bill to cancel a deed to an interest in mining property on the ground of fraud. The grantee named in the deed was not made a party, but it appeared that he had conveyed all his interest to a party who was made a defendant. It was held that he was not a necessary party. He had no present interest in the controversy and had merely acted as a conduit through whom title had passed to the actual defendant.

#### § 525. When Holder of Legal Title Dispensable.

Under conditions that are somewhat difficult to state with precision, it has been held that the holder of a legal title or interest in property, which interest is not necessarily drawn in question in a suit in equity between others concerning the same property, is not a necessary or proper party to such suit.

1. *Boon v. Chiles* (1834) 8 Pet. 532, 8 L. ed. 1034: In a controversy between A and B over the equitable title to land arising out of a contract to convey such equitable title, it appeared that the heirs of the holder of the legal title were not made parties. It was held that they were not necessary parties. The holder of the legal title was a common source, and a controversy over the equitable title arising out of a contract did not necessarily involve the legal title. But it would have been proper and necessary to make those heirs parties if the bill had sought to compel a conveyance of the legal title.

2. *Ringo v. Binns* (1836) 10 Pet. 269, 9 L. ed. 420: In a controversy in equity over the legal title to land, tenants in possession claiming under the holder of the legal title are not proper parties, unless the plaintiff alleges some distinct equity against them. The remedy against them would be at law.

3. *Atkins v. Dick* (1840) 14 Pet. 114, 10 L. ed. 378: A suit at law was suc-

<sup>44</sup> Compare *Railroad Co. v. Ward v. Story* (1894) 30 L.R.A. 265, 12 C. C. (1892) 9 Black 485, 17 L. ed. 311; *De- A. 250, 64 Fed. 524.*  
*bria Case* (1883) 16 Fed. 25, 34; *Hewitt*

cessfully prosecuted against an indorser of a bill of exchange, who thereupon filed a bill to enjoin the judgment, alleging that the bill had been satisfied and extinguished by a prior party. Fraud was alleged as one of the grounds for relief. It was held that one B, who was a prior party and in whose bonds the effects had been placed which had been used to pay the bill, was not a necessary party. If he had an interest in the controversy his rights were purely legal.

#### § 526. Parties in Suit on Undertaking for Benefit of Third Person.

In a suit on a contract made between A and B for the benefit of C whereby B receives a fund in trust for C, the latter can maintain an action against B without joining A as a party.

*McKee v. Lamon* (1895) 159 U. S. 317, 40 L. ed. 165: The Choctaw nation employed one McKee to prosecute a claim against the government with the understanding that he was to have a certain per cent. of the amount recovered. McKee agreed to adjust the claims of others who had previously been employed in the same matter. After recovery, Lamon brought suit against McKee to recover for service rendered by his firm in connection with the prosecution of the claim before McKee was employed. It was held that the Choctaw nation had no interest in the controversy and was not a proper party. The defendant, McKee, was in the position of a trustee and was accountable for the equitable distribution of the percentage received as compensation.

#### § 527. Effect of Absolute Assignment of Interest.

One who has made an absolute, complete, and unconditional assignment of every interest, legal and equitable, which he possessed in the subject-matter of a suit, is an unnecessary and therefore a dispensable party.<sup>45</sup> Thus in a suit to enforce a contractor's lien, there is no propriety in making one of the joint contractors a party where it is shown that he has relinquished his whole right to the plaintiff, his co-contractor.<sup>46</sup> Similarly, a member of a partnership who has transferred all his interest in the firm to his fellows need not be made party to a bill brought by the remaining partners against another firm, their agents, to have an accounting in respect of transactions done by the latter as agents.<sup>47</sup>

#### § 528. When Assignor Necessary Party.

Where, however, a transfer or assignment of an interest which is drawn into a suit appears not to be absolute and unconditional, or

<sup>45</sup> *O'Shaughnessy v. Humes* (1904) 129 Fed. 953.

<sup>46</sup> *Trecothick v. Austin* (1825) Fed. Cas. No. 14,164; *Fitch v. Creighton* (1890) 24 How. 159, 16 L. ed. 596.

<sup>47</sup> *Kilbourn v. Sunderland* (1889) 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. 594.



where any question arises as to the extent or validity of the assignment, the assignor is a proper and necessary party. If there remains any right or liability in the assignor which may be affected by the decree he should be joined.<sup>48</sup>

**§ 529. Improper Joinder—Dismissal—Presence of Party Ignored.**

The defect arising from the improper joining of a party not interested in the controversy can be cured by formally dismissing as to that party, or by striking out his name with the consent of the court.<sup>49</sup> But where parties who are joined in a bill have no real interest in the result of the controversy, their presence may, for jurisdictional purposes, be disregarded.<sup>50</sup>

**§ 530. Dismissal as to Party Whose Presence Fatal to Jurisdiction.**

Where a proper but dispensable party, whose joinder defeats the jurisdiction of the court, is erroneously named as a defendant in a bill and served with process, the court on motion will permit the plaintiff to dismiss as to that party, and thereupon the jurisdiction of the court becomes as fully effective as if such party had never been named as a defendant. In a case where this question arose, the circuit court of appeals observed that courts do not require the performance of idle ceremonies, and that, inasmuch as the plaintiff could certainly have dismissed the whole suit with the permission of the court and then have begun anew without such party, there was no reason why the same end should not be accomplished at once by dismissing as to the objectionable party.<sup>51</sup>

The mere fact that a dispensable party is named as a defendant in the bill does not oust the jurisdiction of the court, when it appears that he has not been served with process and cannot be forced to come in because of his being out of the jurisdiction of the court; but in

<sup>48</sup> *Hubbard v. Manhattan Trust Co.* (1833) 7 Pet. 252, 8 L. ed. 675; *Board* (1898) 87 Fed. 51, 30 C. C. A. 520; *of Commrs. v. Kansas etc. R. Co.* (1877) *Land Co. v. Elkins* (1884) 20 Fed. 545. 4 Dill. 277; *Shearson v. Littleton* (1900)

<sup>49</sup> *Conolly v. Taylor* (1829) 2 Pet. 105 Fed. 533; *Holly Mfg. Co. v. New* 559, 7 L. ed. 518; *Victor Talking Mach. Co. v. American Graphophone Co.* (1902) *affirmed* *New Chester Water Co. v. Hol-* 118 Fed. 50; *Greeley v. Smith* (1844) *ly Mfg. Co.* (1892) 53 Fed. 19, 3 C. C. Fed. Cas. No. 5,747. A. 399; *Foss v. First Nat. Bank* (1880)

<sup>50</sup> *Irvine v. Lowry* (1840) 14 Pet. 3 Fed. 185. *decree affirmed* *Bissell v.* 293, 10 L. ed. 462; *Wilson v. Oswego* *Foss* (1885) 5 Sup. Ct. 851, 114 U. S. Township (1894) 151 U. S. 56, 38 L. 252, 29 L. ed. 126; *Marvin v. Ellis* ed. 70, 14 Sup. Ct. 259; *Carneal v.* (1881) 9 Fed. 368; *Elliot v. Teal* (1878) *Banks* (1825) 10 Wheat. 181, 6 L. ed. Fed. Cas. No. 4,389.

<sup>51</sup> *Sioux City, etc. Co. v. Trust Co.* 297; *Mallow v. Hinde* (1827) 12 Wheat. 193, 6 L. ed. 599; *Vattier v. Hinde* (1897) 27 C. C. A. 73, 82 Fed. 128.

such a case it is proper to amend by formally dismissing as to him. The equity rules (22, 47) seem to contemplate that a defendant becomes a party in fact, only when he has been served or voluntarily appears.<sup>52</sup>

### § 531. Omission of Dispensable Parties Whose Names Unknown.

If a bill shows on its face that certain dispensable parties who would ordinarily be deemed necessary are not made defendants because they are unknown, such excuse for their non-joinder will be accepted, unless the defendant specially controverts it by plea or answer.<sup>53</sup>

#### *Parties Dispensable under Statute and Equity Rule.*

### § 532. Statute Allowing Court to Proceed without Dispensable Parties.

Section 737 of the Revised Statutes and equity rule 47 bear quite directly on certain aspects of the subject of parties, which we have considered above. Section 737 contains two distinct propositions. The first is in these words: "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer."

This language evidently contemplates a situation where a bill is filed naming certain proper and necessary parties as defendants, and it subsequently appears that some of them (not being inhabitants of the district) can neither be found nor voluntarily appear. In this situation the act gives the court authority, in its discretion, to proceed without those parties, they being of the sort denominated 'dispensable. But we apprehend that, before proceeding in any case under the discretion given by this statute, the court would require a formal dismissal to be entered as to all dispensable parties not prop-

<sup>52</sup> *Cole etc. Mining Co. v. Virginia* named, "their confederates, associates, etc. Water Co. (1871) 1 Sawy. 470. See etc., whose citizenship and residences Godfrey v. Terry (1877) 97 U. S. 171, are unknown," these phrases will be 24 L. ed. 944. taken to refer to persons who could

<sup>53</sup> *Alger v. Anderson* (1897) 78 Fed. properly be made parties to the suit 729. Where it is stated, in the intro- without destroying jurisdiction. *See p.* ductory part of the bill, that the suit Richards (1902) 117 Fed. 652. is brought against the defendants

erly before the court. It is an ancient and well-recognized rule of equity practice that where a party is named as a defendant in the bill the plaintiff must either procure service and bring him in or must dismiss him from the suit,<sup>54</sup> and apparently this rule has not been abrogated.

The second proposition embodied in this statute is in these words: "Non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit." This language, it will be perceived, contemplates the situation where parties are not named as defendants at all; and the effect of this clause is to disable the opponent from raising the objection. Under the first clause the court is authorized to proceed notwithstanding want of service or appearance; in the last clause the party plaintiff is authorized to omit these parties from the bill.

The slightest advertence to the contents of the whole section shows that it adds little or nothing to the principles of equity pleading. Clearly it only gives expression to a rule that has always been recognized in equity, and its effect is chiefly limited to proceedings at law. This circumstance has frequently been remarked on by the courts.<sup>55</sup>

Quite similar to the foregoing provisions of the statute is the following provision contained in the equity rules:

Equity Rule 47: In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

### § 533. Judicial Discretion under Rule and Statute.

This rule was framed after the statute in question had been enacted, and it covers practically the whole ground covered by the

<sup>54</sup> *Mandeville v. Riggs* (1829) 2 Pet. 482, 7 L. ed. 493: Where certain individuals are known to the plaintiff and are named as defendants in a bill, they must, being necessary or proper parties, be served with process and brought in. Otherwise the suit cannot proceed to judgment, unless it is made to appear that such parties cannot be reached, in which case if they are dispensable a dismissal might be had as to them. The naming of a party as such in the bill imposes a duty on the plaintiff to get him in.

<sup>55</sup> *Shields v. Barrow* (1854) 17 How. 140, 15 L. ed. 160; *Barney v. Baltimore* (1867) 6 Wall. 280, 18 L. ed. 825; *Chadbourne v. Coe* (1892) 2 C. C. A. 327, 10 U. S. App. 78, 51 Fed. 479.

statute and somewhat more. The rule, like the statute, is merely a statement of a doctrine already worked out in the courts of equity. The statute and the rule both authorize the court, in the exercise of its discretion, to dispense with necessary and proper parties who cannot be joined or brought in as defendants. Superficially it might appear that under this authority the court could dispense with any sort of party and proceed to adjudicate the rights of those actually before the court and over whom the court can exercise its jurisdiction. But it will be noted that the authority granted is discretionary, and it has been held that this discretion will never be exercised where the absent party is one whose presence is indispensably essential to the proper administration of justice. In other words, the court will never proceed to judgment in the absence of an indispensable party.<sup>56</sup>

#### § 534. Absent Parties Not Bound by Decree.

Again, it will be noted that both the statute and the rule contain express statements of the principle that, even where necessary parties are dispensed with and the suit proceeds without them, the decree entered in that suit shall not conclude or prejudice the absent parties. So far as these provisions declare that the absent parties shall not be concluded or bound by the decree, they merely assert a universal principle. So far as they declare that the decree shall not prejudice the absent parties, they give expression to the rule of discretion otherwise involved in the statute and rule. And so it is. From whatever direction the subject is approached, whether by considering the accepted rules of equity practice, or the express provisions of the rule and statute, or the exercise of judicial discretion under the rule and statute, we are always confronted with the general principle that the absence of indispensable parties takes the case out of court. But if a party's interest is such that he may be dispensed with, the court is authorized, under the conditions mentioned, to proceed without him, albeit he would ordinarily be considered a necessary party. The decree, however, must not prejudice him.<sup>57</sup>

<sup>56</sup> *Shields v. Barrow* (1854) 17 How. *ern Pac. Co.* (1895) 157 U. S. 229, 30 L. ed. 158; *Swan Land, etc. Co.* L. ed. 683; *Chadbourne v. Coe* (1892) *v. Frank* (1893) 148 U. S. 603, 37 L. 2 C. C. A. 327, 10 U. S. App. 78, 51 ed. 577; *California v. Southern Pac. R. Fed.* 479; *Smith v. Lee* (1896) 77 Fed. Co. (1895) 157 U. S. 229, 30 L. ed. 683; 779; *Collins Mfg. Co. v. Ferguson Minnesota v. Northern Securities Co.* (1893) 54 Fed. 721; *Hamilton v. Savan-* (1902) 184 U. S. 236, 46 L. ed. 516; *nah, etc. R. Co.* (1892) 40 Fed. 412; *Rogers v. Penobscot Mining Co.* (C. C. Gross *v. Scott Mfg. Co.* (1891) 48 Fed. A.; 1907) 154 Fed. 606. 35; *Plume, etc. Mfg. Co. v. Baldwin*

<sup>57</sup> *Barney v. Baltimore* (1867) 6 Wall. (1898) 87 Fed. 785; *Minnesota v. North-* 280, 18 L. ed. 825; *California v. South-* *ern Securities Co.* (1902) 184 U. S. 230,

*Formal and Nominal Parties.***§ 535. Who Are Formal Parties.**

Formal, or nominal, parties comprise a class that is peculiar, in federal practice, in respect of the fact that though the presence of such parties may be desirable or even required, as a matter of form, yet for jurisdictional purposes they may be disregarded. Formal, or nominal, parties are such as are required, by some positive rule in the law pertaining to remedies, to be joined in the suit, in order that by reason of their presence in the record the rights of others may be enforced. Thus where one person is compelled to sue in the name of another who has not any real interest in the controversy, the person in whose name the suit is brought is only a formal or nominal party.<sup>58</sup> Attorneys who are only joined as representing their principal, against whom the real cause of action exists, are nominal parties.<sup>59</sup>

An officer of a corporation joined as a defendant for purposes of discovery only cannot be considered a merely nominal party. He is a proper and real party; and if jurisdiction in the cause is dependent on citizenship, his citizenship must be taken account of.<sup>60</sup>

**§ 536. Formal Party in Suits on Official Bond.**

If a suit is brought in the name of a state, on the bond of an officer, on the relation of an individual who has a right of action arising from the breach of the bond, the state is only a formal party.<sup>61</sup> The same is true in suits brought in the name of a state on an administrator's bond; and in suits brought on an attachment bond in the name of a United States marshal for the benefit of the party really in interest, the marshal is a nominal party.<sup>62</sup> So, in a suit on an official bond in the name of the governor, the latter is a purely formal party.<sup>63</sup>

46 L. ed. 511; *Swan Land, etc. Co. v. Skinner* (1879) 101 U. S. 577, 25 L. Frank (1893) 148 U. S. 603, 37 L. ed. ed. 963.  
 577; *Northern Indiana R. Co. v. Michigan Cent. R. Co.* (1853) 15 How. 233, 15 L. ed. 460.  
 14 L. ed. 674; *Gregory v. Swift* (1889) 43 Fed. 349; *Colonial, etc. Mortg. Co. v. Hutchinson Mortg. Co.* (1890) 44 Fed. 219.  
 39 Fed. 708; *Cole Silver Min. Co. v. Virginia, etc. Water Co.* (1871) 1 Sawy. 685; *Fisher v. Shropshire* (1893) 147 U. S. 145, 37 L. ed. 115; *Vattier v. Hinde* (1833) 7 Pet. 252, 8 L. ed. 675; *Belding v. Gaines* (1887) 37 Fed. 817.  
 60 *McNutt v. Bland* (1844) 2 How. 9, 15, 11 L. ed. 159; *Browne v. Strode* (1809) 5 Cranch 303, 3 L. ed. 108; *Coal Co. v. Blatchford* (1870) 11 Wall. 172, 177, 20 L. ed. 179, 181; *Walden v. 9, 11 L. ed. 159.*  
 58 *Wood v. Davis* (1855) 18 How. 467, 15 L. ed. 460.  
 59 *Doyle v. San Diego, etc. Co.* (1890) 43 Fed. 349; *Colonial, etc. Mortg. Co. v. Hutchinson Mortg. Co.* (1890) 44 Fed. 219.  
 61 *Indiana v. Glover* (1895) 155 U. S. 513, 39 L. ed. 243, 15 Sup. Ct. 186.  
 62 *Maryland v. Baldwin* (1884) 112 U. S. 490, 28 L. ed. 822; *Huff v. Hutchinson* (1852) 14 How. 586, 14 L. ed. 553; *Wade v. Wortsman* (1837) 29 Fed. 754.  
 63 *McNutt v. Bland* (1844) 2 How. 9, 11 L. ed. 159.

**§ 537. When Husband Formal Party.**

A husband who is joined with his wife as a defendant merely to give the court jurisdiction over her and her property, and against whom individually no relief is sought, is merely a nominal or formal party.<sup>64</sup>

**§ 538. When Trustee Nominal Party.**

A trustee may or may not be a nominal party. He is held to be such where the real controversy is between others and he is joined merely to perform the ministerial act of conveying title, should the same be adjudged to be in the plaintiff. So, where a trustee holding legal title dies and under the law of the state such title passes to the executor of the deceased trustee, such executor is merely a nominal party in a suit between the persons really interested in the land.<sup>65</sup>

Whether a trustee in a given case is a formal or nominal party or a real and indispensable party depends on the particular facts. If the suit affects his trust estate so far that the decree would increase or diminish that estate, he is real and indispensable. If he is merely a stakeholder and the real parties in interest, while not controverting his rights, are litigating with each other over the question who is to enjoy the estate, he is merely a formal party.

1. *Thayer v. Association* (1885) 112 U. S. 717, 23 L. ed. 394: The parties in a trust deed given to secure a debt brought suit against the trustee and its assignee in insolvency, alleging that the trustee was proceeding to sell notwithstanding the debt had been paid. An injunction was sought and a decree adjudging the trust deed satisfied. It was held that the trustee was indispensable. The legal title of the trustee was sought to be extinguished and that could not be done unless he was a party.

2. *Bacon v. Rives* (1882) 106 U. S. 99, 27 L. ed. 69: Executors who were made parties defendant in this bill were held to be only formal parties, because they were joined merely to the end that the interest represented by them might be reached and held subject to the final decree. They occupied substantially the position of garnishees.

3. *Lake St. Elevated R. Co. v. Ziegler* (C. C. A.; 1900) 39 C. C. A. 431, 99 Fed. 114: A railroad company sued to recover of the defendants certain bonds on its own road which were alleged to have been fraudulently obtained by the defendant while acting in the capacity of officer. The trustees in the deed of trust securing the mortgage were made parties in order to get an injunction against their proceeding to enforce the trust at the solicitation of the defendants. No decree was sought against them. It was held that they were formal parties.

<sup>64</sup> *Wormley v. Wormley* (1823) 8 Wheat. 421, 451, 5 L. ed. 651, 659.      <sup>65</sup> *Walden v. Skinner* (1879) 101 U. S. 577, 25 L. ed. 963.

## CHAPTER XII.

### PARTIES TO THE SUIT (*continued*).

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#### *Parties in Class Suit.*

- § 539. Representation of Class Interests.

Class suits present some special and exceptional features in regard to the making of parties. The general rule, as we have already seen,

requires the joinder of all necessary parties wherever possible, and the joinder of all indispensable parties under any and all conditions, the presence of these latter being a *sine qua non* of the exercise of judicial power. Now the class suit contemplates a situation where there are numerous persons all in the same plight and all together constituting a constituency whose presence in the litigation is absolutely indispensable to the administration of justice. Here the strict application of the rule as to indispensable parties would require that each and every individual in the class should be present. But at this point the practice is so far relaxed as to permit the suit to proceed, when the class is sufficiently represented to enable the court to deal properly and justly with that interest and with all other interests involved in the suit. In the class suit, then, representation of a class interest which will be affected by the decree is indispensable; but it is not indispensable to make each member of the class an actual party.<sup>1</sup>

#### § 540. Rule as to Making of Parties in Class Suit.

The practice of the federal courts in regard to the making of parties in class suits is stated in one of the equity rules as follows (here omitting the closing proviso of the rule):

Equity Rule 48: Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it.

The nature and use of the class suit are well illustrated in the following cases:

1. *Smith v. Swormstedt* (1853) 16 How. 238, 14 L. ed. 942: After the division of the Methodist Episcopal Church into two branches, a suit was brought in behalf of the southern branch to establish its right to an interest in the funds of the Book Concern, a trust for the benefit of superannuated preachers. The suit was instituted on the authority of the General Conference; and certain persons were named as plaintiffs who were preachers in the Southern Church and as such interested in the fund. They sued on behalf of themselves and the many hun-

<sup>1</sup> In suits filed by one or more on behalf of many who are in like position, only parties *sub modo*. *Stewart v. Dunham* (1885) 115 U. S. 61, 29 L. ed. 329; the parties actually bringing the suit *Vallette v. Whitewater Canal Co.* (1847) are the real parties. Others of the class *Fed. Cas. No. 16,820*. who come in to share beneficially are *Eq. Prac. Vol. I.—22.*



dred other preachers of the same connection. The defendants were also numerous and a few individuals were made defendants as representative of all. It was held that the bill presented a proper case where some might sue in behalf of all interested in the one subject-matter, and where some might be sued as representatives of many. In discussing this matter, the court said: "Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained. The case in hand illustrates the propriety and fitness of the rule. There are some fifteen hundred persons represented by the complainants, and over double that number by the defendants. It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice. The right might be defeated by objections to parties, from the difficulty of ascertaining them, or if ascertained, from the changes constantly occurring by death or otherwise."

The following observation was added, which affords, as will be seen, a general principle for the guidance of the courts in this sort of cases: "In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried."<sup>2</sup>

2. *Beatty v. Kurts* (1829) 2 Pet. 566, 7 L. ed. 521: The Georgetown Congregation of Lutherans (a voluntary unincorporated association) held land, the title to which was disputed by the defendant; and certain persons claiming to be a committee of the trustees filed a bill to enjoin the defendant from interfering with the property. It was objected that the authority of the committee to institute and maintain the suit was not sufficiently shown, but the supreme court held that the case was one where the suit could be maintained without proof of formal authority, and merely because of the interest of the plaintiffs as representative of their class. It was said: "We think it one of those cases in which certain persons, belonging to a voluntary society and having a common interest, may sue in behalf of themselves and others having the like interest, as part of the same society, for purposes common to all, and beneficial to all. Thus some of the parishioners may sue a parson to establish a general modus, without joining all; and some of the members of a voluntary society or company, when the parties are very numerous, may sue for an account against others, without joining all."

3. *United States v. Old Settlers* (1893) 148 U. S. 427, 37 L. ed. 509: In this case a claim was prosecuted on behalf of the Western Cherokee Indians against the government by certain commissioners appointed by them to represent their interests in the prosecution of the claim. The suit was prosecuted substan-

<sup>2</sup> See *United States v. Old Settlers* (1893) 148 U. S. 430, 37 L. ed. 529.

tially as a class suit, and judgment was entered in the court of claims in that form, that is to say, the general liability was defined and then provision was made for the individual Indians to come in and establish their right to share in the fund. The supreme court observed that though the so-called commissioners did not bring themselves strictly within the rule as representatives of a class, nevertheless the real interests, involved were so far properly represented that the case was allowed to proceed to judgment in that form.

### § 541. Creditors' Suit Prosecuted by One or More in Behalf of All.

In technical creditors' bills filed to procure the proper application of the property of an insolvent estate or corporation ratably to the claims of all creditors, it is the common practice for one creditor to sue as plaintiff on behalf of himself and other creditors. In such case the other creditors may come in, either upon a reference ordered for that purpose or upon a petition *pro interesse suo*, and have the benefit of the decree.

1. *Johnson v. Waters* (1884) 111 U. S. 640, 28 L. ed. 547: A creditor of an estate filed a bill "on behalf of himself and of all others creditors of O. J. Morgan, who shall come in and seek relief by and contribute to the expense of this suit." The purpose of the bill was to set aside as fraudulent and void certain sales of the testator's lands and to have the same sold for the payment of debts. The circuit court found in favor of the plaintiff and directed the lands in question to be seized and sold. It was held by the supreme court that the proper practice thereupon was to open a reference in the master's office in order to give other creditors of the estate due opportunity to come in and have the benefit of the decree. Ordering the proceeds of the sale to be applied to plaintiff's debt alone, was declared erroneous.

2. *Myers v. Fenn* (1806) 5 Wall. 205, 18 L. ed. 604: It is good practice in case of creditors' bills where suit is brought by one or more in behalf of all, to allow a creditor, not being an actual party to the bill, to come in by petition. In this case such a petition was filed, and though no actual order was made permitting the joinder in the suit, all subsequent proceedings were conducted as if the petitioner were a party. It was held that he was a party to the suit.\*

### § 542. Class Suit Not Maintainable Where Defendants Have Separate Interests.

The following case furnishes an illustration of a situation where a suit cannot be conducted against a few as representative of the many, notwithstanding the parties are very numerous and the litigation is thereby rendered cumbersome and inconvenient:

*Ayres v. Carver* (1854) 17 How. 591, 15 L. ed. 179: The plaintiff Carver sought to establish an equitable title to large tracts of public land which had

\* Compare *Ranson v. Winn* (1855) 18 How. 295, 15 L. ed. 368.

been laid off in Mississippi, he having offered to comply, as was alleged, with the law as to entry and private sale. It was alleged that the register of the land office had unlawfully refused to receive his offer. The defendants comprised a large number of individuals who had subsequently entered the land and received patents. The bill enumerated the defendants and the court was asked to designate some to represent the whole body, which was done. It was held by the supreme court that this procedure was not justified. "It is difficult to see any interest or estate in common among these several defendants, that would authorize the rights of the absent parties to be represented in the litigation by those upon whom process has been served, and who have appeared to defend the suit. Their title to the land claimed by the complainant is separate and independent, without any thing in common, it would seem, that could have the effect to make a decree against one binding upon the others, or even require them to join in the defense."

#### § 543. Bill Must Purport to Be Class Bill.

A person not an actual party to a suit cannot, in any case, be held bound by the decree, on the ground that he was a member of a class represented in that suit, where the bill does not purport to be a class bill. There must be something in the bill or in the nature of the suit to admonish the court that it is dealing with interests affecting parties not actually before the court.

*McArthur v. Scott* (1885) 113 U. S. 340, 26 L. ed. 1015: This was a suit by grandchildren of a testator to enforce a trust created under his will. An obstacle was found in a previous decree of a court of equity setting aside that will, and the question was whether these grandchildren, unborn when that decree was rendered, and not actual parties to the suit, were so far represented in interest as to be bound by the decree. The actual parties to the suit in question were the heirs at law (children) of the testator and grandchildren then living. It was held that the present plaintiffs were not bound by the decree. They were not bound as being in the same class as the living grandchildren who were made parties, because "where a suit is brought by or against a few individuals as representing a numerous class, that fact must be alleged of record so as to present to the court the question whether sufficient parties are before it to properly represent the rights of all," and there was no allegation in the bill in that case that there were or might be others in like situation with the grandchildren before the court.<sup>4</sup>

#### § 544. Interest of Party Representing Class.

The person who sues as representative of a class must have an actual interest in the controversy in like right with those whom he proposes to represent. The relation of the parties must, in other

<sup>4</sup> Compare *Miller v. Texas etc. R. Co.* C. C. A. 55, 53 Fed. 867, 9 U. S. App. (1890) 132 U. S. 662, 33 L. ed. 487, 10 406. Sup. Ct. 206; *Bank v. Taylor* (1893) 4

words, be such that the representative and the represented could properly be joined as co-plaintiffs, if it were practicable to do so.

*Georgetown v. Alexander Canal Co.* (1838) 12 Pet. 91, 9 L. ed. 1012: The city of Georgetown filed a bill against the defendant to enjoin a nuisance which was injurious to the inhabitants of that city. The idea underlying the bill was that it appertained to the city in its corporate capacity to protect the interests of its citizens whom it proposed to represent. There was no allegation that the city had any property or any interest in property affected by the nuisance, such as would give it an independent standing in court. It was held that the suit could not be maintained. "They cannot, upon any principle of law, be recognized as parties competent in court to represent the interests of the citizens of Georgetown. Nor is the difficulty obviated by associating with them the citizens of Georgetown, as persons in whose behalf they sue. There are indeed cases in which it is competent for some persons to come into a court of equity, as plaintiffs for themselves and others, having similar interests: such is the familiar example of what is called a creditors' bill. But in that, and all other cases of a like kind, the persons who by name bring the suit, and constitute the parties on the record, have themselves an interest in the subject-matter, which enables them to sue, and the others are treated as a kind of co-plaintiffs with those named, although they themselves are not named: but in this case, it has been already said that the appellants have no such interest as enables them to sue in their own name, and consequently the whole analogy fails."

#### § 545. Parties to Suit Brought by Unincorporated Body.

The question of the right of a few members of a class to sue and be sued as representative of their class has frequently arisen in connection with suits by and against voluntary unincorporated associations. Thus, under equity rule 48, an injunction suit may be maintained by or against a voluntary association, though all members be not joined as parties plaintiff or defendant.<sup>5</sup> There is no precise and uniform practice in regard to the making of parties in suits brought by or against associations.

As to suits brought by or in the right of voluntary societies, it may be observed that the association often selects or appoints its own agencies for bringing the particular suit; and where this is done no question will usually be entertained as to the capacity of the appointed agent to prosecute the suit. Even where no such agent is appointed, the suit will be maintained strictly as a class suit provided the circumstances make this desirable and proper. For the purpose of suing, the chief officers of a voluntary association may be taken as properly representing the membership and as reflecting the interests of the society.

<sup>5</sup> *Evenson v. Spalding* (C. C. A.; 1907) 150 Fed. 523.

### § 546. Parties to Suit against Unincorporated Body.

In suits against unincorporated associations, the plaintiff has to get along the best he can. The general principle to be borne in mind is that a suit against an unincorporated association is a suit against each member individually and not against the body. Here the plaintiff has the benefit of the rule that, the defendants being numerous, he can select a few of the mass as representative of all. The chief officers of the association will generally serve this purpose; but there is no rule requiring process to be served on them rather than on other individuals of the association. The court always has to determine for itself whether the interests involved are properly represented. In a case where this subject was quite fully discussed by Hammond, J., it was observed that there is a fallacy in supposing that the required "representative" capacity rests exclusively with the officials of an unincorporated body, or in any representatives of its choosing. As to plaintiffs, the appointment by act of the membership may be operative and effective, but as regards those who shall represent the body in its capacity as a defendant, this is not necessarily so.<sup>6</sup>

### § 547. True Class Suit Concerns Property.

A little consideration of the matter will reveal to the reader the truth that suits brought by or against numerous defendants are of two radically different types. In the first type, which is that of the true class suit, it will be found that the subject-matter of the suit is a fund or property over which the court can and does acquire an effective jurisdiction by the joining of some persons as plaintiffs or defendants who may be considered representative of all those who are interested in the same fund or property.<sup>7</sup>

### § 548. Spurious Class Suit Founded on Personal Liability.

In the other type of cases, the suit is not concerned with a fund or property at all, but with a personal liability. Here the suit is not a class suit in any proper sense. We may call it the spurious class suit. Illustrations of this type of suit are found in suits by or against involuntary associations brought in respect of some legal

<sup>6</sup> *American Steel etc. Co. v. Wire* before the court." *Spaulding v. Even-Drawers etc. Unions* (1898) 90 Fed. 606. son (1906) 149 Fed. 913, 916; 1 *Foster* "Where an association with many mem- Fed. Pr. sec. 48. bers is represented by a committee or <sup>7</sup> *Smith v. Swormstedt* (1853) 16 regularly appointed officers, if such How. 288, 14 L. ed. 942, cited *ante*, representatives be brought in, it will be § 540, is a good illustration of this class deemed that the association, as such, is of cases.

liability or against numerous defendants to enjoin a threatened injury. Suits for injunction against strikes and other forms of combinations resulting in interference with trade or business fall within this class when they are prosecuted in the form of class suits. It is not even necessary in such cases that the numerous defendants should comprise any formal aggregate or association of persons.<sup>8</sup>

*Rights of Absent Parties as Affected by Decree in Class Suit.*

§ 549. Effect of Decree in Class Suits under English Practice.

It has always been understood in the English chancery, and apparently in the equity courts of this country, that the decree in class suits is binding on all the persons in interest whether they are actually before the court or not; at least this is so where the interest of those persons is properly represented before the court. Those who are actually before the court as plaintiffs or defendants are considered and treated as being the proper legal representatives of those who are absent but who are in like interest. The true class suit in fact supplies an instance of virtual representation. When the court once gets jurisdiction over the subject-matter, it will proceed to clean up every element of the controversy, as it affects each and every party in interest; and to this end all that is necessary is that the different persons in interest shall be before the court either in person or by representation. It is obvious that the court, before proceeding against parties who are such by representation only, will take care to see that all are properly and fairly represented. This has always been fully insisted on.<sup>9</sup> Granting that the idea of proceeding against, or on behalf of, parties who are such by representation only is a valid one, —and that it is based on a sound principle of jurisprudence is obvious from the fact that in many cases justice could not otherwise be administered,—it follows that a decree entered in a class suit must of necessity be valid and binding as to all. Those who are represented are concluded in the same degree and to the same extent as are those who are actually before the court. This is a rational and just conclusion, and it has the sanction of the established usage of the English chancery. The jurisdiction of the court over the subject-matter enables the court to determine the rights of all persons to the property, provided only they are sufficiently represented before the court.

<sup>8</sup> *Evanson v. Spalding* (C. C. A.; 1907) 99 Fed. 606, are illustrations of this class of cases.  
<sup>9</sup> *Co. v. Wire Drawers, etc. Unions* (1898) 150 Fed. 523, and *American Steel etc.*  
<sup>9</sup> Story Eq. Pl., § 120.

**§ 550. Reservation in Equity Rule 48.**

The final clause in equity rule 48 is to the effect that "the decree shall be without prejudice to the rights and claims of all the absent parties." Just what may be the meaning of this language is not very clear. Probably the supreme court, in framing this rule, merely meant here to give expression to the general principle of jurisprudence that a party is not bound by a decree made in a cause to which he is not a party. If the rule is thus interpreted, it is merely a statement of accepted doctrine, and it makes no change in the law. In this view the language in question has precisely the same import as the closing words of the preceding rule 47, which provide that where the court proceeds in a cause without a necessary (but dispensable) party, the decree shall be without prejudice to the rights of the absent party. It is reasonably to be supposed that the two expressions are to be construed as embodying the same general doctrine and as having the same legal effect.

But it will be noted that, taken literally, this closing reservation is inconsistent with the English practice. The rule plainly says that the decree shall be without prejudice to the rights and claims of all the absent parties, the term "absent parties" evidently referring to those who are represented in the class suit but who are not personally before the court. Accordingly, it has sometimes been taken for granted that, so far as mere words go, the reservation in the equity rule modifies the accepted English doctrine.<sup>10</sup> If this conclusion be right, the reservation greatly hampers the efficacy of the class suit and really to a great extent destroys its utility.

**§ 551. Practice of Federal Courts.**

But what have the federal courts, and especially the supreme court, done with this reservation or proviso in equity rule 48? The answer is that the supreme court has done the only thing that could properly be done under the circumstances, namely, it has, in true class suits, ignored the reservation, or at least that interpretation of it which would have the effect of destroying the efficacy of the class suit. Thus, in *Smith v. Swormstedt*, *ante*, which was a true class bill in every respect, the court said: "For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree

<sup>10</sup> *American Steel etc. Co. v. Wire Drawers etc. Union* (1898) 90 Fed. 598.

binds all of them the same as if all were before the court." It must be so. Is it to be conceived that, after a court of equity has entertained a class bill and adjudicated the status of a fund or otherwise determined rights in the subject-matter, the same things can be relitigated by others who are in the same right as those previously before the court and who were represented in that suit? If this were so, a great number of suits might be brought and interminable litigation would ensue. From the very necessity of the case, the first suit in which the different interests are fairly represented must be conclusive. We know of no case in which the validity of this principle was ever questioned. Certainly, no person has ever maintained a second bill upon a matter adjudged in any true class bill. Did any one ever suppose that, when a creditors' suit has been properly conducted and the assets all gathered in and distributed, a creditor, who may have failed to prove his claim, could disturb the decree in that suit and renew the litigation? Clearly he cannot do so, the reservation in equity rule 48 to the contrary notwithstanding.

#### § 552. True Construction of Rule.

It results then that, as regards true class suits, the reservation in equity rule 48 cannot be given literal effect, and the language of that reservation must be construed simply as affirming the general principle of jurisprudence that a person is not bound by a decree made in a cause to which he is not a party. In true class suits each person interested in the fund or property in litigation is virtually represented before the court and is an actual party *sub modo*. He is therefore bound as a party.

But there is certainly one class of cases involving numerous parties in which the reservation of the equity rule is applicable in its full and literal sense. This is the spurious class suit, the suit brought by or against numerous parties in respect of a personal liability. If relief is sought against an unincorporated association of individuals or against numerous defendants who are acting together, it is obvious that a decree entered in a suit against a few only cannot be effective against others who are not actually made parties, unless and until they are formally brought in and bound by the decree; from whence the practice has grown up of allowing supplemental proceedings, in such cases, to bring in persons against whom it becomes desirable to make the decree binding.<sup>11</sup>

<sup>11</sup> *American Steel, etc. Co. v. Wire Drawers, etc. Union* (1898) 90 Fed. 599, 606.



*Parties Plaintiff and Defendant.***§ 553. Aligment of Plaintiffs and Defendants.**

At no point is the diversity between the practice at law and in equity more conspicuous than in regard to the arrangement of the parties. In legal proceedings the rule prevails that those who seek to recover must be made plaintiffs and those against whom recovery is sought must be made defendants. In equitable proceedings this is not always required. The court of equity insists on having before it all whose interests are involved in the controversy, but this object being attained it does not always insist that all the parties entitled to relief, or seeking relief, shall be nominally arranged as plaintiffs, nor conversely that all against whom relief is obtainable shall be named as defendants. This requirement the court of equity is able on proper occasion to dispense with, because of the nature of the controversies that find their way into this court and because of the characteristic flexibility of equitable procedure. When the court of equity once assumes jurisdiction, it proceeds, on equitable principles, to determine the whole controversy, and so far as possible it settles all litigable matters connected with it. He who seeks equity must do equity, is a favored maxim, and hence it is not always necessary that a person should be nominally a plaintiff in order to get relief, nor that he should be nominally a defendant in order to have relief granted against him. It is well established that persons named as co-defendants can have relief administered as among themselves, where such relief is conformable to the case made in the bill and no other rule is violated by granting it.<sup>12</sup>

In a case where the parties are not aligned as plaintiffs and defendants strictly according to their interests, the court may, in its discretion, proceed to the final hearing. The parties are then arranged according to their interests, and relief is administered accordingly.<sup>13</sup>

**§ 554. Who Should Be Joined as Plaintiffs.**

Yet while equity does not always insist that the parties shall be nominally arranged in the bill with precision as regards their adverse

<sup>12</sup> *Boon v. Chiles* (1836) 10 Pet. 177.    <sup>13</sup> *Lalancé, etc. Co. v. Haberman Mfg*  
9 L. ed. 388; *Platt v. Oliver* (1842) 3 Co. (1899) 93 Fed. 197.  
*McLean* 27, Fed. Cas. No. 11,116; *Camp-*  
*bell v. James* (1880) 2 Fed. 338.

interests, it is nevertheless true that reason and the principles of good pleading require that this should be done so far as practicable. The exception that equity permits pertains rather to cases where property rights and interests are involved. Here if equity has jurisdiction of the subject-matter, it will decree among all as appears to be right. It is plain that where a suit in equity is directed merely to the enforcement of a purely personal liability, the same reasons that apply at law should be given weight, and the parties should be arranged as plaintiffs or defendants according to their respective interests. Hence it may still be laid down as a good rule for the guidance of the pleader that all those whose interests are both in harmony with each other and adverse to the interests of the defendants should be joined as plaintiffs. And none others should be joined.<sup>14</sup> It has been held that permission to amend a bill should be denied where the sole object of the amendment is to add, as new parties plaintiff, persons whose interests conflict with that of the actual plaintiff.<sup>15</sup>

#### § 555. General Rule.

No broad principle of much value can be laid down for the purpose of defining the interest that will require a party to be joined as a plaintiff in any given case. This is a matter largely dependent on the particular facts. Generally, it may be said, if a person has such an interest in the controversy as justifies or requires that he be made a party on one side or the other, and that interest is adverse to the interest of the defendant, then he should be joined as a plaintiff, provided he consents to occupy the rôle of a plaintiff. The fact that an interested party refuses to allow his name to be used as a plaintiff is, of course, sufficient to justify others who are entitled to sue in the same right to proceed by joining that party as a defendant.<sup>16</sup> In the cases noted below, particular persons or parties were held to have sufficient interest to justify their joinder as plaintiffs.<sup>17</sup>

Persons who have no community of interest, each having a substantially separate cause of action against a common defendant, cannot join as plaintiffs in a common suit.<sup>18</sup>

<sup>14</sup> *Bunce v. Gallagher* (1867) 5 (C. C. A.; 1896) 81 Fed. 14, 26 C. C. Blatchf. 481, Fed. Cas. No. 2,123. A. 309; *Langdon v. Branch* (1898) 37

<sup>15</sup> *Parsons v. Lyman* (1860) 4 Fed. 449, 2 L.R.A. 120; *Osborne v. Wisconsin Cent. R. Co.* (1890) 43 Fed. 824. Blatchf. 432, Fed. Cas. No. 10,779.

<sup>16</sup> *Wisner v. Ogden* (1827) 4 Wash. C. C. 631, Fed. Cas. No. 17,914. <sup>18</sup> *Schulenberg-Boeckeler Lumber Co. v. Town of Hayward* (1884) 20 Fed.

<sup>17</sup> *Kelley v. Boettcher* (1898) 85 Fed. 422. 55, 29 C. C. A. 14; *Conary v. Sweeney*

### § 556. How Question of Misjoinder Raised.

Demurrer for misjoinder of parties plaintiff is the proper means by which to test the question whether one or more of several plaintiffs have such an interest in the subject-matter of the suit as to justify joining them in the bill.<sup>19</sup>

### § 557. Who Should Be Joined as Defendants.

All interested and proper parties who do not seek relief and who are not entitled to relief should be made defendants. All are to be put in this category who are not active agents in the suit. A party who is made such merely in order that he may be held bound by the decree, and all who are joined for collateral purposes only, as, for instance, for purposes of discovery, should be made defendants.<sup>20</sup> Where an executor or administrator refuses to sue or where he cannot properly join as a plaintiff in the bill, he may be made a defendant in a suit brought by his fellow.<sup>21</sup> One against whom neither relief nor discovery is asked should not be joined as a defendant; and if he is so joined, a demurrer for misjoinder of parties defendant will lie.<sup>22</sup>

### § 558. When Infants Joined as Defendants.

As regards the joining of infants as parties plaintiff or defendant the rule prevails that, if there is any room for choice, they should be made defendants and not plaintiffs. The reason for this rule is found in the fact that the court can more easily and certainly protect the infant when it is in the attitude of a defendant than when it occupies the rôle of a plaintiff. Infants should never be joined as co-plaintiffs with adult parties who are adversely interested.<sup>23</sup>

### *Arrangement of Parties as Affecting Jurisdiction.*

### § 559. Jurisdiction Depends on Alignment According to Interest.

The most important aspect of the matter of the placing of the parties, as plaintiffs or defendants, is that which is concerned with

<sup>19</sup> *Doggett v. Florida R. Co.* (1878) C. A.; 1906) 80 C. C. A. 527, 151 Fed. 99 U. S. 72, 25 L. ed. 301.

<sup>20</sup> *United States v. Coal Dealers Ass'n* (1898) 85 Fed. 252; *Union Mill & Mining Co. v. Dangberg* (1897) 81 Fed. 73; *Newcombe v. Murray* (1898) 77 Fed. 492.

<sup>21</sup> *Monmouth Inv. Co. v. Means* (C. 5 Sneed 130.

<sup>22</sup> *United States v. Pratt Coal & Coke Co.* (1893) 18 Fed. 708.

<sup>23</sup> *McGavock v. Bell* (1886) 3 Coldw. 521; *Thompson v. Mebane* (1871) 4 Heisk. 379; *Davidson v. Bowden* (1887)

the question of jurisdiction in cases where jurisdiction is dependent on the diverse citizenship of the parties. The statute conferring jurisdiction on the circuit court in cases where there is a controversy between citizens of different states means, and has been construed to mean, that the jurisdiction exists when the parties interested on one side of the controversy are citizens of a different state from that of the parties interested on the other side. Now we have already seen that, under the loose rules of equity practice, a party interested on the same side of the controversy as the plaintiff may not infrequently be found, so far as the arrangement of the bill is concerned, on the side of the defendants. The statute does not refer to this casual arrangement of the parties, but regards the parties as being divided into classes according to their actual interest in the controversy. It results that, in every case where jurisdiction depends on citizenship or residence, the actual arrangement of the parties on the record, that is, whether they are nominally plaintiffs or defendants, is to be disregarded; and the question of jurisdiction is to be determined by their actual relations to each other as shown by the pleadings and the facts of the case. The following decisions show how this works in practical application. Many of these cases also incidentally illustrate the interest the respective parties are required to have, in their capacity as plaintiffs or defendants.<sup>24</sup>

*Removal Cases* (1879) 100 U. S. 457, 25 L. ed. 593: The general principle was here first laid down in regard to removal causes as follows: "For the purposes of a removal the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute. If in such arrangement it appears that those on one side are all citizens of different states from those on the other, the suit may be removed."

The same principle has subsequently been applied not only in removal cases but in cases where the question is one of the original jurisdiction of the court.

1. *Pacific R. Co. v. Ketchum* (1879) 101 U. S. 289, 25 L. ed. 932: This was a foreclosure suit brought by Ketchum, a holder of bonds, against the mort-

<sup>24</sup> *Cilley v. Patten* (1894) 62 Fed. 289, 25 L. ed. 932; *Wilson v. Oswego* 498; *Salt Co. v. Brigel* (1895) 31 U. Tp. (1894) 151 U. S. 56, 14 Sup. Ct. S. App. 366, 14 C. C. A. 577, 67 Fed. 259, 38 L. ed. 70; *Shipp v. Williams* 625; *Perin v. Megibben* (1892) 53 Fed. (1894) 10 C. C. A. 247, 62 Fed. 4; *Old* 86, 3 C. C. A. 443; *Board v. Blair Colony Trust Co. v. Atlanta Ry. Co.* (1895) 70 Fed. 414; *Consolidated Water* (1899) 100 Fed. 798; *Mangels v. Brew-Co. v. Babcock* (1896) 76 Fed. 243; *Ing Co.* (1892) 53 Fed. 513; *Smith v. Meyer v. Construction Co.* (1879) 100 Lyon (1890) 133 U. S. 315, 10 Sup. Ct. U. S. 457, 468, 25 L. ed. 593, 597; *Rail-* 303, 33 L. ed. 635; *Boston, etc. Co. v. road Co. v. Ketchum* (1879) 101 U. S. *City of Racine* (1899) 97 Fed. 817.

gagor and the trustees under the mortgage. The plaintiff and the trustees were citizens of the state of New York. The mortgagor was a corporation of Missouri, and the suit was brought in one of the circuit courts of the United States for the eastern district of Missouri. The jurisdiction was wholly dependent upon the fact that all the parties on one side of the controversy were citizens of different states from those on the other. As the parties were arranged by the pleader, this diversity did not exist, and there was no jurisdiction. It appeared, however, that the trustees were necessary parties, because the legal title to the mortgaged property was in them, and they were made defendants because, doubting their authority, they had declined to institute foreclosure proceedings. There were no averments in the bill indicating any antagonism between the trustees and the beneficiaries under the mortgages. The court held that the trustees should be arranged on the same side of the dispute as the plaintiff, and it thereby sustained the jurisdiction.

2. *First Nat. Bank v. Radford Trust Co.* (1897) 26 C. C. A. 1, 80 Fed. 560: In one aspect this case resembled the preceding case, but it differed in another. One beneficiary of a mortgage filed a bill to foreclose, the trustee having refused to do so. The trustee was made a party defendant. The bill was not a simple foreclosure but also sought to exclude the other beneficiaries from sharing. The effect of this was to question the right of the trustee under the mortgage. The result was that the trustee was really opposed in interest to the beneficiary who filed the bill.

3. *Blacklock v. Small* (1888) 127 U. S. 96, 32 L. ed. 70: A bond for the payment of money, secured by a mortgage on real property, was assigned to B as trustee for C, D, and E. The bond was paid off in Confederate money, and the mortgage was released. Subsequently C and D, beneficiaries of the trust, filed a bill to have this satisfaction set aside and to enforce the trust. E, one of the beneficiaries, was named as a defendant. It was held that although nominally made a defendant, her interest was with the plaintiffs and she was to be so considered for jurisdictional purposes.<sup>26</sup>

4. *Pittsburgh etc. R. Co. v. Baltimore etc. R. Co.* (1894) 10 C. C. A. 20, 61 Fed. 705: A railroad company, being a corporation of the state of Maryland, sued two other railroads, both being corporations of the state of Ohio. The relief sought was an accounting under a contract. It appeared that one of the defendant railroads was in like interest with the plaintiff, and the decree of the circuit court was in its favor as well as in favor of the plaintiff, both being given relief against the other defendant company. It was held that the requisite diversity of citizenship did not exist, and in the circuit court of appeals the suit was ordered to be dismissed. Said Lurton, Circuit Judge: "In determining a question of jurisdiction, where it depends upon citizenship, it is unimportant that the pleader has put a particular party upon the one or the other side of the case. Jurisdiction in such cases depends, not upon an arbitrary arrangement of the parties made by the pleader, but upon their arrangement according to interest. If, when arranged by interest in the litigated question, all on one side are citizens of a state other than that of those on the other side, then jurisdiction exists."

5. *Johnson v. Ford* (1901) 100 Fed. 501: A legatee under the will of her father brought suit against the executor and other legatees, being also heirs

<sup>26</sup> *Ayres v. Winwall* (1884) 112 U. S. 187, 28 L. ed. 693.

of her father, to enforce administration. The defendant legatees were made defendants because, it was averred, they refused to join as plaintiffs. It was held that they were in like interest with the plaintiff, and the fact that they were citizens of the same state as the principal defendant, the executor, defeated the jurisdiction of the court. The circumstance that they had refused to join as plaintiffs did not alter the case.<sup>26</sup>

6. *Joseph Dry Goods Co. v. Hecht* (1903) 57 C. C. A. 64, 120 Fed. 760: The purpose of the bill was to enforce specific performance of a contract and to collect a debt. The contract in question had been made by one of the defendants (against whom the plaintiff sought to enforce it) and a firm of which the plaintiff was a member. Another member of this firm was also named as a defendant. It was held that this latter party was in reality on the same side of the controversy as the plaintiff so far as interest was concerned; and inasmuch as he was a citizen of the same state as the defendants, the suit was dismissed.

#### § 560. Rearrangement of Parties to Defeat Jurisdiction.

Where jurisdiction is shown by the pleadings and by the arrangement of the parties in the bill, a defendant who insists on rearranging the parties differently so that jurisdiction may be made thereby to fail, must make a clear showing in favor of the propriety of so doing. Where the facts stated leave it doubtful whether a particular party should be aligned on one side or the other, the court is inclined to favor the division adopted by the plaintiff.<sup>27</sup>

#### § 561. Placing of Nominal Parties Immaterial.

Persons who are purely formal or nominal parties may be omitted or transposed in the pleadings, or they may be joined as plaintiffs or defendants indifferently, without affecting the jurisdiction in any way. These are not to be considered in connection with jurisdiction at all.<sup>28</sup>

<sup>26</sup> See, under former judiciary act, *Missouri etc. R. Co.* (1886) 27 Fed. 1; *Wianer v. Ogden* (1827) 4 Wash. C. C. 631, Fed. Cas. No. 17,914, where it was held that the fact that a party in like interest with plaintiff refused to join, was a good reason for making him a defendant and that for jurisdictional purposes such party would be considered a real defendant.

<sup>27</sup> *Reavis v. Reavis* (1899) 98 Fed. 145.

<sup>28</sup> *Wormley v. Wormley* (1823) 8 Wheat. 421, 451, 5 L. ed. 651. Removal Cases (1879) 100 U. S. 457, 25 L. ed. 593; *Railroad Co. v. Ketchum* (1879) 101 U. S. 289, 25 L. ed. 932; *Walden v. Skinner* (1879) 101 U. S. 577, 25 L. ed. 963; *Harter v. Kernochan* (1880) 103 U. S. 562, 26 L. ed. 411; *Barry v.*

*Reese v. Zinn* (1900) 103 Fed. 97.

Where a state or one of its officials is a mere figurehead, a nominal party, to a suit on a sheriff's or administrator's bond, or an action is instituted in the name of the United States marshal on an attachment bond, the real party in interest is taken into account on the question of citizenship, notwithstanding the general rule that the jurisdiction of the federal courts depends, not on the relative situation of the parties concerned in interest, but on the relative situation of the parties named in the record. *Mexican Cent. R. Co. v. Eckman* (1903) 187 U. S. 429, 47 L. ed. 245; *State v. Baldwin* (1884) 5 Sup. Ct. 278, 112 U. S. 490, 28 L. ed. 822.

1. *Arapahoe County v. Kansas etc. R. Co.* (1877) 4 Dill. 277, Fed. Cas. No. 502: In this case the question of jurisdiction as affected by the position occupied on the record by nominal or formal parties arose in connection with a removal. Mr. Justice Miller, at circuit, pointed out that if the citizenship of persons joined in the suit but not having a real interest in the controversy was permitted to affect jurisdiction almost any plaintiff could get into the federal court or keep out as he should see fit, merely by the device of joining such parties as plaintiff or defendant as the circumstances might require. Said he: "It would be a very dangerous doctrine, one utterly destructive of the rights which a man has to go into the federal courts on account of his citizenship, if the plaintiff in the case in instituting his suit can, without any right or reason or just cause, and with the express declaration that he asks no relief from them, join persons who have not the requisite citizenship, and thereby destroy the rights of the parties in federal courts. We must, therefore, be astute not to permit devices to become successful which are used for the very purpose of destroying that right."

### § 562. Arrangement of Parties in Stockholders' Suit.

Consideration of the proper alignment of parties with a view to a determination of the question of jurisdiction is frequently necessary in suits brought by stockholders in the right of their corporation. Inasmuch as these suits are always technically based on a right of action primarily vested in the corporation itself, it has been suggested that, in theory, the corporation ought always to be treated as being in the same right with the actual plaintiff stockholder.<sup>29</sup> But this is untenable. The true rule is apparently found in the proposition that in a suit in equity, instituted by a stockholder in his own name but upon a right of action existing in his corporation, the stockholder's corporation will be aligned with the defendants whenever the officers or persons controlling the corporation are shown to be opposed to the object sought by the complaining stockholder, and when such opposition does not appear the stockholder's corporation will be aligned with the complainant in the suit. In other words, it is not so much the actual interest in the fruits of the suit that determines the alignment of the parties as it is the position of the corporation as shown in the record. The following decisions abundantly support this conclusion:

1. *Greenwood v. Freight Co.* (1881) 105 U. S. 13, 26 L. ed. 961: The bill was filed by a citizen of New York against his company, a corporation of Massa-

<sup>29</sup> See *De Neufville v. New York, etc.* (1904) 132 Fed. 252, 251. The criticism *R. Co.* (1897) 25 C. C. A. 306, 81 Fed. does not go to the result reached in that case, but only to the ground stated in the opinion. The point of the criticism in *Groel v. United Electric Co.* seems to be well taken.

chusetts, and other defendants of the same state. The suit was brought in the right of the company, the officers having refused to sue in its name. The bill was sustained, the company in question being treated *sub silentio* as if properly aligned with the other defendants. Had it been conceived that the company should be aligned with the plaintiff, because of identity of interest, jurisdiction would have failed.

2. *New Jersey Cent. R. Co. v. Mills* (1885) 113 U. S. 249, 28 L. ed. 949: In this case jurisdiction depended on aligning the company in whose right the suit was brought with the stockholder plaintiff, but the court refused to entertain the suit and remanded it to the state court where it had originated. The corporation itself was named as a defendant in the bill, and in its answer it united with the defendant directors in denying the illegality of the acts complained of.

3. *Groel v. United Electric Co.* (1904) 132 Fed. 252: The plaintiff, a citizen of New Jersey, and a stockholder in the E. company, a corporation of that state, sued in its right to have an accounting against a corporation of the state of Pennsylvania. The E. company was named as a co-defendant with the Pennsylvania company, but jurisdiction depended on its being aligned in interest with the plaintiff. It appeared that the officers of the E. company were antagonistic to the suit and had refused, on proper demand, to institute the same in the name of the corporation. It was held that the corporation must be considered a defendant, and jurisdiction accordingly failed. The attitude of the corporation, it was reasoned, was determined by the attitude of its officers, and inasmuch as these were shown to be hostile to the suit, the corporation was treated as an adverse party.<sup>10</sup>

4. *Hutton v. Joseph Bancroft & Sons Co.* (1896) 77 Fed. 481: This was a case in which the company, in whose right the stockholders' suit was brought, admitted in its answer practically all the allegations of the bill. By the attitude which it thus assumed on the record, the stockholders' company identified its interest with the plaintiff and indicated a willingness to accept the relief which the bill sought in its favor. The defendant company was therefore aligned in interest with the plaintiff. It is to be observed of this case that the situation here before the court would rarely arise if the ninety-fourth equity rule were enforced, which requires the plaintiff stockholder, as a condition precedent to the right to maintain the suit, to demand of the directors of the company that they themselves bring suit in the company's name. Where the directors, in breach of their trust, refuse to let the corporation sue, it will generally be found that they so far control the corporation as to determine a hostile attitude for the corporation in the suit.

5. *De Neuville v. New York, etc. R. Co.* (C. C. A.; 1897) 26 C. C. A. 306, 81 Fed. 10: In this case a stockholder of the N. company brought suit, in the right of that company, against its directors and against the C. company, alleging that, by the fraudulent devices of the defendants, said company had been stripped

<sup>10</sup> Other cases in which the plaintiff's company, in whose right the suit was brought, has been aligned with the other defendants, are the following: *East Tennessee, etc. R. Co. v. Grayson* (1896) 119 U. S. 240, 7 Sup. Ct. 190, 30 L. ed. 382; *MacGinness v. Boston, etc. Min. Co.* (1902) 119 Fed. 96, 55 C. C. A. 648; *Redfield v. Baltimore, etc. R. Co.* (1903) 124 Fed. 929; *New Albany Waterworks v. Louisville Banking Co.* (1903) 122 Fed. 776, 58 C. C. A. 876. *Contra, Lamm v. Parrot* (1901) 111 Fed. 241, Eq. Prac. Vol. 4.—23.



of its property and the same had become vested in the C. company. In order to support jurisdiction, it was necessary to align the N. company with the other defendants. The jurisdiction was supported, but on the wrong ground. The court thought that as a matter of general principle the company in whose right the stockholder's suit is brought should always be aligned with the plaintiff because of an identity of interest. This rule would have destroyed jurisdiction in that case. But the court also thought that under the ninety-fourth rule the bill could be maintained, the authorities having here, in effect, so the court considered, established an exception to the wholesome rule requiring parties to be aligned according to interest. But this seems not to be the correct view. *Prima facie*, the corporation in whose right the suit is brought and which is named as a defendant in the bill should be treated as properly aligned with the defendants. This is rendered conclusive if the corporation, as usually happens, assumes a hostile attitude towards the plaintiff. But if, as happened in the Hutton case, *supra*, the corporation identifies its interest with the plaintiff, it may properly be aligned with the plaintiff in order to sustain the jurisdiction.

## CHAPTER XIII.

### INSTITUTION OF THE SUIT.

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*Solicitors and Counsel.*

§ 563. Employment of Solicitor.

Ordinarily the first step looking towards the institution of a suit in equity in behalf of any person is the employment by him, or by some one rightly acting in his behalf, of a skilled legal adviser. Of course a person who labors under no disability can prefer a bill in equity *in propria persona* without professional assistance, but this is rarely advisable. Even where the plaintiff is himself learned in the law and intends to conduct the suit personally, he will usually procure another to act as his nominal legal representative.

§ 564. Function of Solicitor.

Under the English practice there were two sorts of lawyers who were recognized as having authority to represent clients in the chancery court. The solicitor was the active managing agent in the litigation in all matters pertaining to the external conduct of the

suit. He it was to whom authority had to be given, in the first instance, to institute the suit. He was supposed to draw the bill, and it was his duty to attend to all the steps incident to the commencement of the suit, to see that the right process and proper notices were issued, and to attend to all incidental proceedings in the course of litigation. The solicitor was in fact the actual agent of the plaintiff in the conduct of the suit.

### § 565. Function of Counsel.

The second class of skilled lawyers concerned in the conduct of chancery suits were counsel. Counsel represent the litigants before the court, being a sort of intermediary between the solicitor and the chancellor. The relation between the solicitor in chancery and the counsel is analogous to that between the attorney at law and the barrister. As the attorney at law was permitted and accustomed to act as solicitor in chancery, so the barrister was authorized to appear as counsel in chancery causes. In fact the word counsel as now used in England refers to and implies a barrister. The counsel in an equity cause is responsible for the pleadings and he is required to give his approval to the bill by signing it.<sup>1</sup> Owing to this requirement of the English practice, the bill, though in theory drawn by a solicitor, was often in fact prepared by counsel himself.<sup>2</sup>

### § 566. Solicitor and Counsel in Federal Practice.

In the federal courts the formal distinction between solicitor and counsel is not of great importance, but attention is rightly paid to it by those who are pleased to defer to traditional usage. Besides, it not infrequently happens, in suits where several lawyers are employed, that the distinction between solicitor and counsel expresses nicely enough their actual relations to the litigation and to each other. But the distinction is purely conventional and formal. Those who act as solicitors are not confined to acting in that capacity. Those who act as counsel may also act as solicitors. In other words,

<sup>1</sup> Equity Rule 24.

<sup>2</sup> Says Mr. Daniell: "The duty of drawing the bill ought, strictly, to be performed by the solicitor, who is allowed a fee for so doing; but as the rules of the court require that the draft should be signed by counsel, who is held to be responsible for its contents, and, as much of the subsequent success of the suit may depend upon the manner in which the bill is framed, it has been found more convenient in practice that

the bill should be prepared, as well as signed, by counsel; and, accordingly, except in particular cases, instead of the draft of the bill being prepared by the solicitor, and laid before counsel for his perusal and signature, the instructions to prepare the bill are generally, in the first instance, laid before the counsel, who prepares the draft from those instructions, and afterwards affixes his signature to it." 1 Dan. Ch. Pr. 408.

the distinction between the office of solicitor and counsel, so far as it affects the capacity of the legal practitioner, is done away with. A lawyer who is authorized to act as counsel in the federal courts may appear as solicitor, and he who is authorized to appear as solicitor may act as counsel. One person may therefore appear in both capacities, and it is not required that the plaintiff should employ one lawyer as solicitor and another as counsel. But in conducting the litigation, the lawyer or lawyers actually employed may well take notice of the two different functions and govern themselves accordingly. Thus all formal notices and interlocutory proceedings that should be given and conducted by a solicitor will be given and conducted by the proper lawyer acting in the capacity of solicitor; while all matters pertaining to the function of counsel will be conducted by counsel, if there be any, or by the lawyer in the suit who acts in that capacity. Where a rule of court requires that the bill shall be signed by counsel the signature of the lawyer who signs the bill should be followed by words indicating that he acts as counsel. But if the bill is signed by a lawyer who is authorized to act as counsel in the particular court, and instead of signing as counsel he adds to his signature the words "solicitor for plaintiff," the defect is a venial and formal one. The bill should not be dismissed for such informality, and the defect may be corrected on mere suggestion, when notice is called to it.<sup>3</sup>

### § 567. Attorneys and Counsellors before Supreme Court.

In the supreme court, acting as an appellate court, lawyers who appear in equity causes usually appear and act as counsel, for there is nothing to be done in the capacity of solicitor. Hence in this court practitioners are sworn in as attorneys and counsellors.<sup>4</sup> In the early history of the supreme court the distinction between attorney and counsellor was so far recognized that one admitted to appear there as an attorney was not permitted to appear as a counsellor; and counsellors were not permitted to act as attorneys. Consequently lawyers desiring to appear in both capacities had to be sworn in twice.<sup>5</sup> But this requirement has long been abrogated, and one proceeding now suffices to admit the practitioner in both capacities. Of course the admission of a lawyer to practice before the supreme court

<sup>3</sup> *Stinson v. Hildrup* (1878) 8 Biss. 376, Fed. Cas. No. 13,459. provided as follows: "Counsellors may be admitted as attorneys in this court, on taking the usual oath." Dewhurst,

<sup>4</sup> Supreme Court Rule 2.

<sup>5</sup> Supreme Court Rule 3 (old series). Rules of Practice, 4. Rule 14 (old series) of Aug. 12, 1801,

as a counsellor by implication confers authority upon him to appear and act as solicitor, for the greater authority includes the less.

**§ 568. Solicitor's Authority to Institute Suit.**

Before proceeding to commence a suit in equity the solicitor should have special authority to institute that suit. A retainer by which a lawyer is authorized in general terms to act as solicitor for a party has been considered insufficient to warrant the commencement of a particular suit, but under such a retainer the solicitor may defend a suit brought against his client.<sup>6</sup> Authority to defend an action at law does not authorize the bringing of a suit to enjoin such action.<sup>7</sup> Obviously the question whether a general retainer will be a sufficient authority to authorize the bringing of a suit must depend to a great extent on the nature of the contract and the conditions existing at the time it is made, also upon the scope of the duties of a solicitor as understood in the particular jurisdiction. There is no doubt but that a general retainer might be so effected as to authorize the solicitor to bring suits in regard to any of the matters committed to his care and supervision.

**§ 569. Authority Must Extend to All Plaintiffs.**

The rule that suits must be brought only when sufficient authority to that end has been conferred on the solicitor applies not only to situations where a particular person is to sue alone, but to all cases where several are to sue as co-plaintiffs. The special authority should extend to each person who is joined. Even though a particular plaintiff is made such only as a matter of form, an authority from him to that effect must be obtained. Perhaps it is better to say that the naming of a person as plaintiff is never a matter of mere form. Lord Eldon once observed: "I cannot agree that making a person a plaintiff is only *pro forma*. . . . It is too much for solicitors to take upon themselves to make persons parties to suits, without a clear authority."<sup>8</sup> If a particular party needs to be joined only as a matter of form, he can be made a defendant. If he must, for any reason, be made a plaintiff his consent must be obtained.

**§ 570. Authority Need Not Be in Writing.**

If the solicitor deems it possible that his authority to institute a particular suit should be questioned, or if the interests involved in

<sup>6</sup> 1 Dan. Ch. Pr. 403.

<sup>8</sup> *Wilson v. Wilson* (1820) 1 Jac. & W.

<sup>7</sup> *Wright v. Castle* (1817) 3 Meriv. 12. 457.

the suit are complicated and extensive, it is a good precaution for him to see that his authority to sue is put in writing. Ordinarily, this is not done, and written authority is not absolutely necessary in any case.<sup>9</sup> Parol authority is enough, and any sufficient expression of consent will prevent a plaintiff from afterwards repudiating the act of his solicitor in bringing the suit. Acquiescence on the part of a plaintiff after receiving information that a suit has been brought in his name will effectually estop him to question the authority to sue.<sup>10</sup>

#### § 571. Motion to Dismiss Unauthorized Suit—Presumption of Authority.

If a suit is brought in the name of a plaintiff who has given no authority to that effect, the course for him to pursue, if he wishes to be rid of responsibility for the suit, is promptly to move that the bill may be dismissed with costs, such costs to be paid by the solicitor who filed the bill. This motion may be made by the plaintiff in person or by any counsel employed by him for that purpose. A motion to dismiss a suit as having been instituted without authority from a person named as plaintiff should be based upon and accompanied by an affidavit from that plaintiff, and in this affidavit the want of authority should be fully made to appear. A bill exhibited in the name of a married woman against her husband will be dismissed on a proper affidavit from her showing that she knew nothing about the suit or had not consented to it.<sup>11</sup> It may be observed that unless the solicitor's authority is called in question and impeached by an affidavit from the plaintiff the presumption is indulged that he had full authority. Solicitors and counsel are officers of the court, and things done by them in the regular course of duty are presumed to be properly authorized.

#### § 572. Affidavit Proving Solicitor's Authority.

The solicitor whose conduct is called in question by a motion to dismiss for lack of authority from the plaintiff may put in a counter-affidavit to show that he had authority to take that step, but, as before indicated, he must clearly show a special authority.<sup>12</sup>

#### § 573. Discretion of Court upon Motion to Dismiss.

Though a bill will usually be dismissed when a plaintiff shows a want of authority to bring the suit and disclaims responsibility in

<sup>9</sup> Lord v. Kellett (1835) 2 Myl. & Cox, Ch. Cas. 240, 1 Ves. Jr. 200; Titterton v. Osborne (1762) 1 Dick. 350.

<sup>10</sup> Wilson v. Wilson (1829) 1 Jac. & W. 457; Dundas v. Dutens (1790) 2

<sup>11</sup> 1 Dan. Ch. Pr. 404.

<sup>12</sup> Wright v. Castle (1817) 3 Meriv. 12.

respect to it, this does not necessarily follow; and the court has a discretion in the matter. This discretion may well be exercised where the motion to dismiss is filed by one of several co-plaintiffs. In such a situation the motion may be directed to stand over till the hearing, then to be disposed of as the occasion warrants. This is particularly proper where the motion is dilatory and the person complaining appears to be guilty of laches; but in the final decree on the merits costs as between solicitor and client may be taxed in his favor against the parties who without authority made him a co-plaintiff.<sup>13</sup>

### *Security for Costs.*

#### § 574. General Rule.

There is no statute or equity rule applicable to all the courts requiring a plaintiff prosecuting a suit in a federal court to give security for costs; and the rule therefore is that, in the absence of a local rule requiring such security, a plaintiff, being a resident of the district, is entitled to proceed with his suit without giving a bond to secure his adversary against costs.<sup>14</sup>

As regards nonresidents, the practice in the federal courts has always been to require security for costs,<sup>15</sup> a requirement in conformity with the usage of the English chancery from a remote period.<sup>16</sup>

<sup>13</sup> *Dundas v. Dutens* (1790) 2 Cox, Ch. Cas. 236, 1 Ves. Jr. 196.

<sup>14</sup> There seems to be no provision in the acts of Congress in regard to the giving of security for costs in the federal courts, except in prize causes and in suits upon contractors' bonds. See 4638 R. S. and Act of Aug. 13, 1894, ch. 280, sec. 2, 38 Stat. L. 278.

The extent to which an officer of a court may be entitled to insist on the prepayment of the fees allowed by law for the doing of clerical and official acts is uncertain. These are apparently different from the costs as properly understood, the latter term referring, it seems, to the costs taxable against one litigant in favor of the other. At common law the person entitled to fees could insist on payment when the service was rendered. *Roy v. Louisville, etc. R. Co.* (1888) 34 Fed. 277. The statute authorizing suits to be maintained by poor persons, on oath of poverty, of course modifies this rule.

<sup>15</sup> *McCutchen v. Hilleary* (1804) 1

Cranch C. C. 173; *Duane v. Rind* (1806) 1 Cranch C. C. 231; *Lovering v. Heard* (1806) 1 Cranch C. C. 349; *Nicholls v. Johns* (1812) 2 Cranch C. C. 66; *Roberts v. Reintzell* (1821) 2 Cranch C. C. 235; *Lyman Ventilating Co. v. Southard* (1875) 12 Blatchf. 405; *Heckman v. Mackey* (1887) 32 Fed. 574; *Roy v. Louisville, etc. R. Co.* (1888) 34 Fed. 276; *Stewart v. The Sun* (1898) 36 Fed. 307; *Miller v. Norfolk, etc. R. Co.* (1891) 47 Fed. 264.

Where a circuit extends over more than one state, a plaintiff in an equity cause who resides in another state than that where the suit is pending, but in the same circuit, cannot be required to furnish security for costs, except at the first term. After that term has passed a motion to require security for costs will be refused as being too late. *Foster v. Swasey* (1846) 2 Woodb. & M. 217, Fed. Cas. No 4,984.

<sup>16</sup> 1 Dan. Ch. Pr. 33-39; 1 Smith Ch. Pr., 2d ed., 555.



### § 575. Local Rules Requiring Security.

It is within the competency of a court of equity to adopt a rule requiring security for costs from all plaintiffs, and some of the federal courts have adopted such rules.<sup>17</sup> This step seems to have been usually taken in order to bring the practice of the particular federal court on this point into conformity with the practice of the state courts. Of course the state practice, even when sanctioned by a state statute, is not, of its own force, binding on a federal court of equity.<sup>18</sup>

### § 576. How Security Given.

Security, when the same is required, is given either by the deposit of a reasonable sum of money with the clerk of the court, to be held and applied to the payment of the costs chargeable to the party making such deposit,<sup>19</sup> or by the giving of a bond for costs.

The bondsman should be satisfactory to the clerk and, if an individual, he should be a resident of the district. A surety company is not objectionable. The solicitor for the plaintiff may become security for costs in the absence of a court rule to the contrary. But the practice is reprehensible, and is prohibited by rules of the court in many circuits.

### § 577. Bond for Costs.

The bond for costs is a simple acknowledgment in writing by the surety, that he is bound for all costs that may be adjudged in that suit against the party named as principal, or for which the latter may become liable. The bond should be tendered when the bill is filed. The court may, at any time, order that a better or larger bond be

<sup>17</sup> *Lyman Ventilating, etc. Co. v. But see Heckman v. Mackey* (1887) 32 Southard (1875) 12 Blatchf. 405; *Bradford v. Bradford* (1878) 2 Flipp. 290; *McClaskey v. Barr* (1897) 79 Fed. 412; *Robinson v. Honstain* (1897) 79 Fed. 678. See Rule 9 for Circuit Court of the Southern District of Ohio, 2 Bond 433, 434; also Rule 2 of the present Rules of Practice in Circuit Court for Southern District of Ohio.

<sup>18</sup> *Ray v. Law* (1806) 1 Cranch C. C. 349: It has been said that a state statute in regard to the giving of security for costs is not binding on a federal court even in legal proceedings. *Bradford v. Bradford* (1878) 2 Flipp. 290; *Roy v. Louisville, etc. R. Co.* (1888) 34 Fed. 276.

<sup>19</sup> The deposit of the sum of fifty dollars is recognized as sufficient security to justify the institution of a suit in the Circuit Court for the Southern District of Ohio. See No. 2 of the rules of that court.

The clerk shall not be compelled to file or docket any suit or to issue any process, nor the marshal to serve or execute any process, until a deposit of a sum sufficient to cover the immediate costs to accrue therein shall have been made; and they may demand security for future costs in any amount not excessive. No. 37 of Rules of Circuit Court of the Eastern District of Louisiana.

given, and if the security is in the form of a money deposit the amount may be ordered to be increased. Generally speaking, the court has ample power by special rule or order to make such regulations in regard to the security for costs as right and justice require.<sup>20</sup>

*Suit Brought by Poor Person.*

**§ 578. Security Not Required of Poor Person.**

In order to prevent the hardship that might be expected to result in some instances from a too rigid application of rules requiring the plaintiff to give security for costs, a statute has been enacted by Congress to the effect that any citizen of the United States may commence and prosecute to conclusion any suit or action, without being required to prepay fees or costs, or to give security therefor, upon filing a statement in writing and under oath to the effect that on account of his poverty he is unable to pay the costs of the suit or action, or to give security, and that he believes he is entitled to the redress sought. It is also provided that, after the suit is brought, the plaintiff may meet and avoid a demand for fees or security for costs by filing an affidavit of the purport just stated. The court is given authority to dismiss any suit brought under this statute, where it is made to appear that the allegation of poverty is untrue, or if the court is satisfied that the cause of action is frivolous or malicious. The statute does not take away the plaintiff's liability for costs, and if he prosecutes the suit unsuccessfully, judgment will be entered against him in the same way as if the suit had been prosecuted in

<sup>20</sup> See No. 2 of Rule of Circuit Court of the Southern District of Ohio.

The following rule is in force in the First Circuit: Whenever all the plaintiffs or complainants, whether in proceedings at common law or in equity, reside without the district, any defendant or respondent may, within one calendar month after his appearance, enter an order as of course for security for costs to be furnished within one calendar month after notice thereof by the clerk, if not over two hundred dollars, by a surety to be approved by the clerk, or by deposit in the registry; but the court or a judge thereof may direct new or additional security or strike out or modify such order. On failure to give such security the proceedings shall be dismissed, unless the court or judge

impose further terms in reference thereto. No. 6 of Rules of Circuit Court for First Circuit.

The following rule is in force in the federal court of the Eastern District of Louisiana: In all cases the defendant may file a motion for the purpose of requiring the plaintiff to give security for the defendant's costs, and the court may then order that the cause shall not be proceeded with until said motion is heard and determined. After notice to the plaintiff's counsel, the court may, in its discretion, fix the amount of the security and grant said motion. During the progress of the cause, additional security may likewise be moved for and granted after notice. Rule of Circuit Court for the Eastern District of Louisiana, adopted Jan. 22, 1902.

the usual manner. All that the statute does is to enable him to sue without giving security beforehand.<sup>21</sup>

### § 579. Statute Inapplicable in Appellate Proceedings.

This statute has no application to proceedings in the supreme court, and consequently a plaintiff in error or appellant prosecuting a writ of error or an appeal to the supreme court must give a bond with sufficient security to prosecute his writ or appeal with effect, as required in section 1000 of the Revised Statutes.<sup>22</sup> The same rule appears to be true of appellate proceedings generally, in the circuit courts of appeals as well as in the supreme court.<sup>23</sup>

### *Formal Commencement of Suit.*

### § 580. Filing of Bill.

When the bill has been drawn by the plaintiff's solicitor, or counsel, and other preliminary conditions complied with, such as the giving of a cost bond, where such is required, the next step consists in the filing of the bill. This point of time marks the technical beginning of the suit, and the cause is pending from the moment the bill is filed in the office of the clerk of the court, whether process has been served or not.<sup>24</sup> But by one of the rules of equity practice, the suit is not actually entered by the clerk on the docket as a pending suit until the subpoena has been executed and returned.<sup>25</sup>

The term "filing" refers to the official act of the clerk in receiving the bill; and so far as form is concerned, the filing is made technically complete by the clerk's notation of the fact of the filing of the bill, and the date thereof. This note is indorsed on the bill when it is delivered to the clerk.

By filing a bill, properly signed by counsel, the plaintiff appears in court and submits himself to its jurisdiction. No formal appear-

<sup>21</sup>Act of July 20, 1892, ch. 209, 27 Stat. L. 252. This statute is not confined in its application to suits in equity but extends to proceedings at law as well. A discussion of all the cases in which the provisions of this statute have been considered is therefore not within the province of this treatise. Full annotations will be found in 2 Fed. Stat. Anno. 294-296.

<sup>22</sup>Galloway v. Fort Worth Bank (1902) 186 U. S. 177, 46 L. ed. 1111.

<sup>23</sup>The Presto (C. C. A.; 1899) 36 C. C. A. 394, 93 Fed. 522. *Contra*, Reed v.

Pennsylvania Co. (C. C. A.; 1901) 49 C. C. A. 572, 111 Fed. 714; Fuller v. Montague (1892) 53 Fed. 206; Brinkley v. Louisville etc. R. Co. (1899) 95 Fed. 245; Columb v. Webster Mfg. Co. (1896) 76 Fed. 198; Volk v. B. F. Sturtevant Co. (C. C. A.; 1900) 39 C. C. A. 646, 99 Fed. 532. These cases to the contrary were decided before the supreme court case cited in the preceding note.

<sup>24</sup>Flower v. MacGinnis (C. C. A.; 1901) 50 C. C. A. 291, 112 Fed. 377.

<sup>25</sup>Equity Rule 16.

ance on behalf of the plaintiff is therefore necessary in the absence of a court rule requiring it.<sup>26</sup>

### § 581. Suit Begun When Bill Filed.

While the general rule is, as stated above, that the suit is commenced when the bill is actually filed, it has nevertheless been held that, for certain purposes and in certain aspects, the suit is not commenced, in a complete and proper sense, until the subpoena has been served. Distinctions therefore must be drawn. It has been decided that, when the filing has taken place, the suit is so far commenced that at the trial the bill cannot be sustained by proof of wrongful acts done after the filing of the bill and before the service of process. In other words, where the equity of the bill is based upon the previous doing of wrongful acts, those acts must be shown to have been done before the bill was filed.<sup>27</sup> The filing of the bill and not the service of the subpoena also operates as the commencement of the suit, so far as to give jurisdiction to a federal court as against a state court of concurrent jurisdiction, in which a suit is filed later and process served quicker than in the federal court.<sup>28</sup>

### § 582. When Service of Process Necessary.

On the other hand, it has been held that a suit in equity is not effectually begun so as to give the court jurisdiction over the person of the defendant and to create a *lis pendens*, until the subpoena has been served. The filing of the bill followed by actual notice to the defendant is not enough.<sup>29</sup>

Suits in equity brought upon publication against a defendant, in conformity with the statute referring to the enforcement of liens on land, are not considered to be commenced so as to stop the running of the statute of limitations, until the defendant has done all that it

<sup>26</sup> But in the first circuit it is required that the bill should be accompanied by a formal appearance of the solicitor. No. 7 of Rules of the Circuit Court of the First Circuit.

<sup>27</sup> *Humane Bit Co. v. Barnett* (1902) 117 Fed. 316; *Stessinger v. Buckingham* (1883) 17 Fed. 454.

<sup>28</sup> *Farmers' Loan & Trust Co. v. Lake St. R. Co.* (1900) 177 U. S. 51, 44 L. ed. 667.

<sup>29</sup> *Farmers' Loan & Trust Co. v. Lake St. etc. R. Co.* (1900) 177 U. S. 51, 44 L. ed. 667; *Wheeler v. Walton & Whann*

*Co.* (1895) 65 Fed. 720; *Union Trust Co. v. Rockford etc. R. Co.* (1874) 6 Bls. 197, Fed. Cas. No. 14,401; *Platt v. Archer* (1872) 9 Blatchf. 559, Fed. Cas. No. 11,213; *Belmont Nail Co. v. Columbia Iron & Steel Co.*, 46 Fed. 8. See also *Wilmer v. Railroad Co.* (1875) 2 Woods 420, Fed. Cas. No. 17,775.

The writ of subpoena "must be issued and served upon all the parties defendant to a bill . . . before a cause can be properly said to be commenced," 1 Dan. Ch. Pr. 564.

is necessary for him to do to obtain process to bring the defendant before the court. The mere filing of the bill is not enough.<sup>20</sup>

### Original Process.

#### c. Subpoena.

### § 583. Writ of Subpoena.

The writ of subpoena constitutes the proper process, in the first instance, in all suits in equity to enforce the appearance of the defendant.<sup>21</sup>

This writ is ancient, and its early history quite obscure. The first writ used in chancery to bring the defendant before the court seems to have been a writ *quibusdam certis de causis*, which enjoined the attendance of the defendant under a threat of the "heavy indignation" of the king or under a threat of some grave danger to fall upon the defendant in case of his disobedience to the writ. Some time during the fourteenth century some official connected with the chancery office substituted a definite pecuniary penalty for this indefinite threat of something terrible. As thus changed, the writ became the writ of subpoena, as it was thereafter known. The credit for the invention of the writ is usually, but possibly erroneously, credited to John Waltham, who was a Master of the Rolls from 1381 to 1386 and a Master in Chancery during the same period. The writ of subpoena dates from about that period, but it seems to have been known somewhat earlier than 1381.<sup>22</sup>

### § 584. Penalty of Writ.

The penalty expressed in the English writ of subpoena was in the sum of one hundred pounds. In the federal courts, the penalty is usually expressed in the sum of two hundred and fifty dollars. No

<sup>20</sup> *Bisbee v. Evans* (1183) 17 Fed. 474.

<sup>21</sup> Equity Rule 7.

Mr. Daniell says that the writ of subpoena is not, properly speaking, a process at all, as the term process is more properly applicable to those proceedings that are subsequently resorted to for the purpose of compelling obedience to the subpoena, in the same manner that the term process at common law is applied, not to the original writ, but to the writs issued in case the defendant refuses to obey the original writ. This distinction is not ob-

served in the equity rule, and it may be said to be obsolete so far as our practice is concerned. The same learned author adds: "The writ of subpoena differs from the other writs of process, in being directed to the party himself, whereas the subsequent writs or orders are directed, not to the party himself, but certain ministerial officers, commanding them to take certain proceedings against the defendant, calculated to enforce his obedience." 1 Dan. Ch. Pr. 564.

<sup>22</sup> *Baildon, Select Cases in Chan.* xiv.

doubt, in the early practice, the court of chancery may have enforced the pecuniary penalty stated in the subpoena, and the court certainly had power to do so. But during the period of authentic practice, this penalty has remained a mere threat. If the defendant refuses to obey the writ, the usual process for compelling obedience has been by attachment and contempt proceedings. In modern times recourse has been had to the practice of taking a decree *pro confesso* against a defendant who fails to respond. It has consequently been unnecessary to invoke the authority of the threat contained in the writ of subpoena in order to penalize an obstinate defendant. Of course when a defendant has been attached and brought before the court for contempt in refusing to answer, it is legitimate and customary to fine him for his contumacy, but it is not necessary to go back to the penalty expressed in the writ to find authority for imposing this fine. The authority of the court would be the same even if no definite penalty were expressed in the writ. It follows that, as stated, the penalty expressed in the writ of subpoena is of a purely formal character.

#### § 585. Seal and Tests of Subpoena.

The writ of subpoena as used in the English chancery was sealed with the great seal and tested in the King's name. In the federal courts, the subpoena runs as from the President of the United States. It is under the seal of the court from which it is issued and is signed by the clerk of that court. If the writ issues from the supreme court or from the circuit courts—and most equity suits are begun in these courts—the writ must be formally tested by the Chief Justice of the United States, or, when that office is vacant, by the associate justice next to him in precedence.<sup>23</sup>

The date of the subpoena should be that of the day on which it is issued;<sup>24</sup> but an error in the dating will not vitiate the subpoena, if the mistake is obvious. A subpoena seasonably served is not rendered ineffective by reason of the fact that the date it bears is the same as the return day indicated in the writ.<sup>25</sup>

#### § 586. Memorandum of Appearance Day.

At the foot of each subpoena the clerk places a memorandum to the effect that the defendant must enter his appearance in the suit,

<sup>23</sup> R. S. 911.

If the writ issues from a district court—and very few equity suits can be begun in this court—the writ bears the tests of

the judge, or, when that office is vacant, of the clerk. R. S. 911.

<sup>24</sup> R. S. 912.

<sup>25</sup> *Roberts v. Brooks* (1896) 71 Fed. 914.

in the clerk's office, on or before the date at which the writ is returnable, otherwise the bill to be taken *pro confesso*.<sup>36</sup>

### § 587. Issuance of Subpoena.

The subpoena is not issued from the clerk's office in any suit until the bill has first been filed.<sup>37</sup> To obtain the issuance of a writ of subpoena it was formerly necessary, under the practice of the English chancery, that the solicitor of the plaintiff, or his clerk in court, should leave a note, called the *præcipe*, or subpoena-note, at the subpoena-office, requesting the issuance of the writ. Upon this authority only was the subpoena made out and sealed.<sup>38</sup>

### § 588. Application of Plaintiff for Issuance of Subpoena.

Our equity rule 12 does not in terms require the leaving of a formal subpoena-note with the clerk. It merely says that the clerk shall issue the subpoena "upon the application of the plaintiff." Any request of the plaintiff's solicitor, oral as well as written, is sufficient to authorize the clerk to issue the subpoena; and undoubtedly, if the clerk issues the subpoena upon oral suggestion only, it is entirely valid. But as a matter of correct office practice the clerk may well require that the request for the issuance of the subpoena shall be evidenced by a written note. This seems to be a situation where the analogy of the practice of the English High Court might profitably be used to supplement the equity rules and to control our practice.<sup>39</sup>

If a writ of subpoena should be issued by a clerk on the mere filing of a bill without any request whatever from the plaintiff, the subpoena would clearly be good; but the plaintiff could possibly have the writ set aside by the court, if any good reason appeared why this should be done. We cannot see that the defendant would have any right to complain about it.

### § 589. Address of Subpoena—Names of Defendants.

The subpoena is addressed to the defendant, or defendants, and it should contain their Christian names as well as their surnames.<sup>40</sup> In this respect it should follow the enumeration of the parties defend-

<sup>36</sup> Equity Rule 12.

<sup>37</sup> 1 Dan. Ch. Pr. 502; Equity Rule 11.

By Equity Rule 4 (series 1822) it was provided that the plaintiff should "file his bill before or at the time of taking

out the subpoena." The import of the present rule 11 is the same as that of the earlier rule.

<sup>38</sup> 1 Dan. Ch. Pr. 500.

<sup>39</sup> See Equity Rule 90.

<sup>40</sup> Equity Rule 12.

ant as given in the prayer for process and in the introductory part of the bill.

A fictitious name cannot be used to designate a party in a bill. A subpoena sued out for an unknown party who is for convenience designated by a fictitious name is ineffectual, if the party so designated refuses voluntarily to appear, and on the contrary enters a special appearance and questions the validity of the process. The only method to be pursued is to find out the defendant's name or, if that be impossible before the suit, then to file the bill against such as are known and ask discovery as to those unknown. Of course if the unknown parties are dispensable, it can be stated that they are unknown, and this is sufficient to excuse any attempt to join them in the suit.

*Kentucky Silver Min. Co. v. Day* (1873) 2 Sawy. 468, Fed. Cas. No. 7,710: The introductory part of the bill enumerated defendants as being certain persons there named and also "one hundred and fifty other persons of whose names plaintiff is ignorant and who are designated each by the name of John Doe, and whose true names, when discovered, plaintiff asks leave to insert herein." The prayer for process ran in the same form and the subpoena likewise. The process was served on the defendants named and also upon those designated by the fictitious name John Doe. These latter appeared and moved to quash the service and the subpoena, which was done.

#### § 590. Number of Names in One Subpoena.

Under the English practice, it used to be customary to insert the names of only three defendants in one subpoena, husband and wife being counted as one.<sup>41</sup> In the federal courts it is usual to include in one subpoena the names of all the defendants; but the plaintiff has the liberty to direct whether the writ shall be thus joint or whether a separate writ shall be issued for each defendant. However, husband and wife are treated as one, and they are included in the same writ.<sup>42</sup>

#### § 591. Duplicate Writ for Defendant Living in Other District.

If a state contains more than one district and there are two or more defendants residing in different districts of the state, the clerk issues a duplicate writ of subpoena against the defendant or defendants residing in the more remote district. Such duplicate writ is directed to the marshal of the district where it is to be served, and

<sup>41</sup> 1 Dan. Ch. Pr. 559.  
Eq. Prac. Vol. I.—24.

<sup>42</sup> Equity Rule 12



the clerk indorses on it a statement of the fact that it is a true copy of the writ sued out of the court of the proper district.<sup>43</sup>

**§ 592. Alias Writ of Subpoena.**

The issuance of *alias* and *pluries* writs of subpoena can be procured whenever any subpoena has been returned not-executed as to any defendant. In such case the plaintiff can have another writ, *toties quoties*, if he shall require it, until due service is made.<sup>44</sup>

**§ 593. Form of Writ against Defendant Sued in Representative Capacity.**

The subpoena should show the capacity in which the defendant is sued. Thus if the bill seeks to hold him liable in a representative capacity, such as that of executor or guardian, the process should run against him as executor or guardian. If he is sued both individually and in a representative capacity, the subpoena should so indicate. However, the requirement stated in this paragraph is one that would not, apparently, be very rigidly enforced; and it would doubtless be hard to impeach proceedings, otherwise regular, merely on the ground that the subpoena does not discriminate clearly between the capacities in which a defendant is sued. If the copy of the subpoena served on a defendant and left in his hands clearly gives him information that he must come into court and put in whatever defense he has, the courts are inclined to hold that he is bound, at least in his individual capacity.<sup>45</sup>

*b. Service of Subpoena.*

**§ 594. By Whom Service May Be Made.**

The subpoena having been duly issued, the next step is to get the writ served and returned into the office of the clerk of the court. The marshal of the district, or his deputy, is the proper person to serve the subpoena. The court of equity may, however, specially appoint some one else. Valid service cannot be made by any other

<sup>43</sup> This practice can be properly adopted in suits based on Act of March 3, 1875, sec. 8. Formerly it was prescribed as proper under 740 R. S.; but that section is probably now repealed by the other act referred to, and the court no longer has jurisdiction over causes where any defendant lives out of the district where he is sued, save only in the class of suits specified in the Act of March 3, 1875, sec. 8.

<sup>44</sup> Equity Rule 14.

<sup>45</sup> *Cornell v. Green* (1897) 88 Fed. 821, 824, *affirmed* (C. C. A.; 1899) 37 C. C. A. 85, 95 Fed. 334.

persons than these.<sup>46</sup> A clerk cannot serve process.<sup>47</sup> If the marshal or his deputy is a party to the suit, the subpoena must be served by an individual specially appointed for that purpose.<sup>48</sup>

### § 595. Mode of Service.

As to the mode in which service should be effected, it is provided in equity rule 13, that a copy of the subpoena shall be delivered by the officer serving the same to the defendant personally. If service is not thus made, it may be accomplished by leaving a copy of the subpoena "at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family."<sup>49</sup>

A federal court of equity cannot acquire original jurisdiction over the person of a defendant within the territorial limits of the court's jurisdiction, otherwise than by the service of process under this rule or by a voluntary appearance.<sup>50</sup>

*Von Roy v. Blackman* (1877) 3 Woods 96, Fed. Cas. No. 16,997: Under equity rule 13, service of a subpoena by leaving a copy at a dwelling-house, in the absence of the defendant, is not good, unless the copy is left with an adult person who is a member of or resident in the family. A return is bad which shows that the copy was left at the domicile of the defendant with a person "over the age of fourteen years" who was "residing at said domicile." Residing at the defendant's domicile does not necessarily make one a resident in his family. [The fact was not observed upon that the return also failed to show that the copy was left with an adult, though this was doubtless a fatal defect. In our law, a person is not an adult in either legal or common acceptance until he is of full legal age. In the civil law a male is adult at fourteen.]

### § 596. What Is Place of Abode.

Service by leaving a copy of the subpoena at a certain place as the dwelling-house of the defendant is not effective, where it is made to appear by affidavits that the defendant has not lived there for two years. Nor is the case helped by the circumstance that the affidavits, supporting the motion to dismiss the service, fail to show that the defendant has some other particular place of abode.<sup>51</sup>

<sup>46</sup> Equity Rule 15.

<sup>47</sup> *Deacon v. Sewing Mach. Co.* (1882) Fed. Cas. No. 3,694c.

<sup>48</sup> R. S. 922.

<sup>49</sup> Equity Rule 13.

<sup>50</sup> *Pennoyer v. Neff* (1877) 95 U. S. 714, 24 L. ed. 565; *Mexican Cent. R. Co. v. Pinkney* (1893) 149 U. S. 194, 37 L.

ed. 699; *United States v. American Bell Telephone Co.* (1886) 20 Fed. 17, 32.

<sup>51</sup> *Hyslop v. Hoppock* (1872) Fed. Cas. No. 6,988.

Service of process by posting a copy on the door of a dwelling-house in accordance with a state statute is not good service, if it appears by competent

In making service by leaving a copy with a person found at the dwelling-house of the defendant, it is not sufficient to leave the process with one who, at the time, is in the corner of a yard one hundred and twenty-five feet away. But if the person is on the steps or portico or in any building adjoining or attached to the dwelling, it is sufficient.<sup>52</sup>

The service on a married woman has been held to be good where the officer left a copy of the subpoena with her husband in the store below their dwelling, one entrance to the dwelling apartments being through the store.<sup>53</sup> After separation, but prior to actual divorce, the wife's place of abode remains at the home of her husband; and service on her by leaving a copy there in the hands of her husband has been held sufficient, where it was sought in a subsequent suit to impeach the foreclosure of a mortgage of community property, which foreclosure had been based on such service, the property having been mortgaged in the name of the husband.<sup>54</sup>

#### § 597. Service beyond Jurisdiction of Court.

The process of a circuit court has no vitality outside of the territorial limits of the court's jurisdiction. Therefore service of a subpoena beyond the jurisdiction is unauthorized. If a subpoena be so served, the service may be set aside on motion to that effect.<sup>55</sup>

On making an order to set aside service on the ground that such service was had beyond the jurisdiction, the court may, no doubt, at the same time, quash the subpoena altogether as regards that defendant. But it may, if it sees fit to do so, refuse to quash the subpoena, and do no more than set aside the invalid service; for the situation may be such that the court would have jurisdiction over the defendant if he should waive the privilege of being sued in his own district. In such case the subpoena may be kept in existence as a sort of symbol of the contingent power of the court. A motion made by a

evidence that the house was not the usual place where the defendant or his family resided at the time the notice was posted. *Boewell v. Otis* (1850) 9 How. 350, 13 L. ed. 170; *Harris v. Hardeman* (1852) 14 How. 340, 14 L. ed. 446; *Earle v. McVeigh* (1875) 91 U. S. 503, 509, 23 L. ed. 398, 400.

<sup>53</sup> *Kibbe v. Benson* (1873) 17 Wall. 625, 21 L. ed. 741; *Phoenix Ins. Co. v. Wulf* (1880) 1 Fed. 775.

<sup>54</sup> *Phoenix Ins. Co. v. Wulf* (1880) 1 Fed. 775.

<sup>55</sup> *Johnson v. Richmond Beach Imp. Co.* (1894) 63 Fed. 493.

<sup>56</sup> *Toland v. Sprague* (1838) 12 Pet. 300, 328, 9 L. ed. 1093, 1104; *Bourke v. Amison* (1887) 32 Fed. 710; *Pacific R. Co. v. Missouri Pac. R. Co.* (1890) 1 McCrary 647; *Picquet v. Swan* (1828) 5 Mason 35; *Hume v. Pittsburgh, etc. R. Co.* (1877) 8 Biss. 31, Fed. Cas. No. 6,865.

nonresident to set aside a subpoena against him has been refused where the motion was made before he had been actually served.<sup>58</sup>

A party named as a defendant in the bill and against whom process is prayed but who appears to be a nonresident and for that reason beyond the reach of the court's process does not become a party to the suit until he voluntarily appears. Therefore the absence of such a person may be ignored, if he is dispensable. But it is well to dismiss formally as to him, if he refuses to appear.<sup>57</sup>

#### § 598. Waiver of Defective Service.

Filing an answer to the merits or entering into a binding stipulation so to do operates to waive any objection that might arise from the failure to serve the subpoena or from any defect in the service.<sup>58</sup> A plea to the jurisdiction *ratione personæ*, based on the ground of the lack of the requisite diversity of citizenship, waives defective service or an insufficient return of the subpoena.<sup>59</sup>

The writing of the words "service accepted," or their equivalent, on a subpoena by a defendant, operates as an acknowledgment of service and waives any ground of objection as to the mode of service. It does not amount to an appearance such as to waive the objection to the jurisdiction of the court over the person. The defendant does not thereby acquiesce in being sued in a district other than that of his residence.<sup>60</sup>

#### § 599. Service on Corporation.

Process can be served on a corporation only by making service on an officer or on some one or more of its agents. The law may, and ordinarily does, designate the agent, or officer, on whom process is to be served. For the purpose of receiving such service, and being bound by it, the corporation is identified with such agent or officer. The power to receive and act on such service, so far as to make it known to the corporation, is thus vested in such officer or agent.<sup>61</sup>

Service of process on a clerk of the corporation when made by the express direction of the officers of the company is good.<sup>62</sup>

<sup>58</sup> *Mason v. New York Steam-Power Co.* (1898) 87 Fed. 241.

<sup>57</sup> *Cole Silver Min. Co. v. Virginia & Gold Hill Water Co.* (1871) Fed. Cas. No. 2,989.

<sup>59</sup> *Seattle, etc. R. Co. v. Union Trust Co.* (C. C. A.; 1897) 79 Fed. 179, 24 C. C. A. 512.

<sup>60</sup> *Jenkins v. York Cliffs Imp. Co.* (1901) 110 Fed. 807, 906.

<sup>61</sup> *Butterworth v. Hill* (1895) 114 U. S. 128, 29 L. ed. 119.

<sup>62</sup> *Lafayette Ins. Co. v. French* (1855) 18 How. 408, 15 L. ed. 453; *Eureka Lake, etc. Co. v. Yuba County* (1886) 116 U. S. 416, 29 L. ed. 673; *St. Clair v. Cox* (1892) 106 U. S. 353, 27 L. ed. 223.

<sup>63</sup> *Davidson v. Donovan* (1835) 4 Cranch C. C. 578, Fed. Cas. No. 3,603.

### § 600. Dereliction of Corporate Officer.

The circumstance that the officer of a corporation, upon whom valid service is had, conceals the fact of service from other officers of the corporation and thereby prevents the taking of proper steps to defend does not invalidate the service. The corporation must pay the penalty of his carelessness or lack of fidelity.<sup>62</sup>

### § 601. Service on Infant.

An infant who is defendant in a suit must always be personally served with process. Service on a general guardian in the absence of the infant is wholly ineffectual to bring the infant into court. Nor is this rule affected by the circumstance that by a state statute the guardian is required to appear for and represent his ward in all legal suits.<sup>64</sup> If the record shows lack of service on an infant the decree as against him is void on its face.<sup>65</sup>

Local practice in some of the states permits of the appointment of a guardian *ad litem* for nonresident or absent infants, such guardian being required to take the answer of such infant and then to file it in court. By this means the infant is brought in without actual service. This practice has been sanctioned by the supreme court as applicable to suits concerning interests in lands located within the state or district. But this method cannot be used to get jurisdiction of an infant to subject him to a purely personal liability.<sup>66</sup>

In partition proceedings the rules as regards service and notice to infants are not so strictly enforced as in ordinary suits. Partition is a special proceeding.<sup>67</sup> But even in such proceedings the method provided by law for bringing the infant into court must be followed.<sup>68</sup>

#### c. The Return.

### § 602. Return Day.

Every subpoena must be returned to the clerk's office in due course by the officer to whom it is delivered for service. The day upon which the writ is returnable is called the return day. Of course the

<sup>62</sup> See *Allen v. Dallas etc. R. Co. and Co. v. Bangs* (1880) 103 U. S. 435, (1878) 3 Woods 318, Fed. Cas. No. 221. 26 L. ed. 580; *Manson v. Duncanson*

<sup>64</sup> *Insurance Co. v. Bangs* (1880) 103 U. S. 533, 41 L. ed. 1105. (1897) 166 U. S. 533, 41 L. ed. 1105.

<sup>65</sup> *New York Life Ins. Co. v. Bangs* Ct. 30, 128 U. S. 53, 32 L. ed. 415.

(1890) 103 U. S. 435, 26 L. ed. 580. <sup>67</sup> See *Robinson v. Fair* (1888) 9 Sup.

<sup>68</sup> *United States Bank v. Ritchie* 966.

(1834) 8 Pet. 123, 8 L. ed. 890; *Insur-*

writ may be returned before the return day, but when that day comes the writ must be accounted for. It is thereafter *functus officio*. The return day is determined by equity rule 12. Under this rule the plaintiff is given the right to elect between two dates. He may request the clerk to make the writ returnable on the next rule day occurring after twenty days from the time of the issuance of the writ; or he may elect for the writ to be made returnable on the rule day next succeeding the rule day that occurs after twenty days from the issuance of the writ.

When the marshal, or other person appointed to serve the process, returns the writ as served and executed, the clerk enters the suit on his docket, with a memorandum of the time when the entry was made.<sup>69</sup>

### § 603. Return of Process.

The marshal or other person serving the subpoena should use diligence in the effort to find the defendant;<sup>70</sup> and the return to the subpoena should state what was done in serving the process. It should not state conclusions of law or fact that are not necessarily involved.<sup>71</sup>

If process is served by the deputy marshal the return should be made in the name of the marshal by his deputy, but if the return is made in the name of the deputy marshal as such, the decree entered in that cause cannot be set aside for the irregularity.<sup>72</sup>

If process is served by a person specially appointed by the court, he must make an affidavit to the truth of the facts stated in the return.<sup>73</sup> A return made by the marshal or his deputy needs no other authentication than that supplied by the proper official designation.

### § 604. Sufficiency of Return.

The legal sufficiency of a return on the facts stated therein is always open to question; and it is the duty of the court to take notice of the sufficiency or insufficiency of the return of its officers to its process. If from the facts stated it appears that no valid service was

<sup>69</sup> Equity Rule 16.

<sup>70</sup> Before a return that "after diligent search" the marshal was unable to find the defendant can be justified, he should seek that person in good faith at the last known place of residence. An attachment sued out on such a return will be set aside where it appears that the marshal, serving the process on a married woman and having sufficient

information to show where she had previously lived, failed to seek her at that place. *Provost v. Pidgeon* (1881) 9 Fed. 409.

<sup>71</sup> *United States v. American Bell Tel. Co.* (1886) 29 Fed. 17.

<sup>72</sup> See *Hill v. Gordon* (1891) 45 Fed. 270, 278.

<sup>73</sup> Equity Rule 16.

had, the service will be set aside.<sup>74</sup> A return showing that service was made on a different person from the one named in the subpoena is bad. A return of service as made upon Jacob Krug is not a good service as against a defendant Jacob Kraig, the two names not being *idem sonans*.<sup>75</sup>

The recital of a return as regards the capacity in which a particular defendant was served is immaterial, where the copy of the subpoena left with him shows that he was served in another and proper capacity.<sup>76</sup>

Where jurisdiction is dependent upon the fact that service is had in the particular district in which suit was brought, as in patent suits against nonresidents, the return should affirmatively show that service was had in that district.<sup>77</sup>

#### § 605. Return of Service by Leaving Copy.

Where the subpoena is served by leaving a copy at the defendant's dwelling-house in his absence, the return must show that the copy was left with some one authorized by equity rule 13 to receive it.<sup>78</sup> A return is defective which shows that a copy of the writ was left at the defendant's "place of business" instead of his dwelling-house or usual place of abode.<sup>79</sup> But a return showing that the subpoena was served by leaving a copy "at the dwelling-house" of the defendant is sufficient. It is not essential that it should say "at the dwelling-house or usual place of abode," or "at the dwelling-house and usual place of abode."<sup>80</sup>

#### § 606. Amendment of Return.

An officer who has made an incorrect or insufficient return will be allowed to amend it, so as to make it show the true state of facts. This may be permitted even after the suit in which the incorrect return was made is finally disposed of and after a new proceeding has been brought to set the decree in that case aside. The return may be even amended after the term of the officer has expired.<sup>81</sup>

<sup>74</sup> Von Roy v. Blackman (1877) 3 Woods 98, Fed. Cas. No. 16,997.

<sup>75</sup> McClaskey v. Barr (1891) 45 Fed. 151.

<sup>76</sup> Cornell v. Green (1897) 88 Fed. 824, affirmed (C. C. A.; 1899) 37 C. C. A. 85, 95 Fed. 334.

<sup>77</sup> Thayer v. Wales (1872) 5 Fisher Pat. Cas. 448, Fed. Cas. No. 13,872. See Allen v. Blunt (1849) 1 Blatchf. 480, 487.

<sup>78</sup> Day v. Phelps (1872) Fed. Cas. No. 3,689.

<sup>79</sup> Halsey v. Hurd (1853) 6 McLean 14.

<sup>80</sup> Jenkins v. York Cliffs Imp. Co. (1901) 110 Fed. 807.

<sup>81</sup> Phoenix Ins. Co. v. Wulf (1890) 1 Fed. 775.

Where a suit had been instituted in a state court and thence removed to the federal court, the latter court refused to grant a motion by the plaintiff that the sheriff of the county where the suit was first brought should be allowed to amend his return upon the record of the state court, such amendment to be thence certified by the clerk of the state court to the federal court. This jurisdiction of the state court had been terminated by the removal.<sup>82</sup> Possibly a different question would have been presented in this case if the motion had been that the sheriff be allowed to amend his return on the record of the federal court.

### § 607. Conclusiveness of Recital of Facts in Return.

On the point of the conclusiveness of the recital of facts contained in the officer's return, the authorities are not in entire harmony. The doctrine formerly current and apparently even yet in some degree a correct statement of law may be expressed thus: The return of the officer serving a subpoena is conclusive as to all matters recited in the return that are within the proper and legitimate scope of the return. That is to say, whatever facts the officer, acting in the course of his duty, should insert in the return, if true, are conclusively presumed to be true in the suit wherein the return is made. It follows that a return cannot be impeached by showing in the particular suit that its recitals are false. And a plea to that effect is bad.<sup>83</sup> But in another and independent suit the return may be shown to be false.<sup>84</sup>

This rule, which remits a party prejudiced by a false return either to his action against the officer for damages or to an independent suit in equity for relief against the judgment or decree obtained on the false return,—which latter suit will lie only in certain cases,<sup>85</sup>—does not seem to have worked as badly as might be imagined, especially where, as under former conditions, parties defendant were usually served *in propria persona*. Under modern conditions, situations often arise where the enforcement of such a rule would lead to injustice so gross as to shock the moral conscience. Accordingly, we find a decided disposition on the part of the courts to ignore the rule or evade it. This is especially true in the federal courts. It may possibly still be true that a return cannot be impeached so far as it states

<sup>82</sup> *Talman v. Baltimore & O. R. Co.* 503, 23 L. ed. 396; *Von Roy v. Blackman* (1891) 45 Fed. 156. This was an action (1877) 3 Woods 98, 101, Fed. Cas. No. 16,997. at law. Compare *Walker v. Robbins*

<sup>83</sup> *Von Roy v. Blackman* (1877) 3 (1852) 14 How. 584, 14 L. ed. 562. Woods 98, Fed. Cas. No. 16,997.

<sup>84</sup> *Earle v. McVeigh* (1875) 91 U. S. How. 584, 14 L. ed. 562. <sup>85</sup> See *Walker v. Robbins* (1852) 14



the particular steps taken by the officer in the course of his duty; but on all collateral questions and on all points that involve mere conclusions the return may be controverted.

### § 608. Recital of Service on Officer or Agent.

One of the most fruitful sources of controversy in regard to the validity of service and the conclusiveness of the return is found in cases where service is had on the local agent or representative of a foreign corporation. The question whether a particular agent is exercising a function that will make service on him a good and valid service on the principal is a mixed question, or conclusion, of law and fact, and the defendant can always raise this question, even against the return of the officer, if steps are taken to bring the matter up in the proper way. But to this end it is necessary that he should first enter a special appearance, as the entering of a general appearance or the doing of any act that amounts to a general appearance operates as a waiver of all objections to the jurisdiction of the court over the person. This includes all matters going to the sufficiency and regularity of the service.<sup>86</sup>

### § 609. Impeaching Return on Question of Competency of Agent.

Having entered a special appearance the defendant may attack the jurisdiction of the court over him by any step or procedure recognized in equity practice as appropriate to the occasion. No doubt a special appearance accompanied by a motion to dismiss, supported by the requisite affidavits, supplies one of the most satisfactory means of testing the regularity of the service and the competency of the person on whom service was made. Such at least seems to be the prevailing practice in the federal courts.<sup>87</sup> But a preference has sometimes been expressed for the use of a plea in abatement as a means of raising this issue.<sup>88</sup>

*American Cereal Co. v. Pettijohn Cereal Co.* (1895) 70 Fed. 276: A Minnesota corporation, being sued in Illinois, specially appeared and moved to dismiss the service on the ground that the person on whom service was had was not its agent

<sup>86</sup> See post, § 659, *Defects Waived by General Appearance*. en on this issue and the motion was sustained.

<sup>87</sup> In *American Bell Telephone Co. v. Pan Electric Tel. Co.* (1885) 28 Fed. 625, a motion to vacate the service was made on the ground that the person on whom service was made had no authority in this behalf. Depositions were tak-

<sup>88</sup> *Rubel v. Beaver Falls Cutlery Co.* (1884) 22 Fed. 293,  *citing Mineral Point R. Co. v. Keep* (1859) 22 Ill. 9; *United States v. American Bell Telephone Co.* (1886) 20 Fed. 17, 28.

or servant within the meaning of the statute governing such service. The plaintiff moved to strike defendant's motion from the files on the ground that the question thus raised could be presented only by plea in abatement. But it was held not so. After referring to the fact that under the Illinois practice, such question was properly raised by plea in abatement, the court observed: "I find, however, that the practice of making the question by motion, and not by plea, prevails quite generally in the federal courts; and this, I conclude, upon reflection, is the correct practice. The determining consideration is that the matter at issue, however it may result, will not end the suit,—if found against the defendant, the defendant is in court and must plead; if in favor of the defendant, the return of the writ is vacated or quashed, and the suit remains pending,—whereas a plea, either in abatement or in bar, if made out by proof, puts an end to the proceeding. The view that a motion to be determined on affidavits is the proper practice in such cases is sustained by English decision."

#### § 610. Form of Order Vacating Service.

On sustaining a motion to dismiss the service, the court, having jurisdiction of the subject-matter, will not dismiss the suit altogether but will only enter an order vacating the service and dismissing the party improperly served.<sup>89</sup>

#### *New Process.*

#### § 611. Additional Process Necessary for New Parties.

Upon the filing of an amended or supplemental bill new process is not necessary, unless new parties are made. Those defendants who are already before the court may be ruled to answer within the proper time without more ado.<sup>90</sup> If new parties are made in the amended bill they should, of course, be served.<sup>91</sup>

A stipulation by counsel for defendant whereby, in consideration of an extension of time for that purpose, he agrees to answer on the merits to an amended bill waives any right to rely on the plaintiff's failure to serve process on the amendment.<sup>92</sup>

Upon the filing of a bill of revivor or a bill in the nature of a bill of revivor, a subpoena is issued by the clerk requiring the person against whom it is desired to continue the proceedings to appear and show cause, if any he has, why the suit should not be revived.<sup>93</sup>

<sup>89</sup> *Fitzgerald, etc. Co. v. Fitzgerald* (1890) 11 Sup. Ct. 38, 137 U. S. 98, 34 L. ed. 606. <sup>92</sup> *Seattle, etc. R. Co. v. Union Trust Co.* (C. C. A.; 1897) 24 C. C. A. 512, 79 Fed. 179.

<sup>90</sup> *Shaw v. Bill* (1877) 95 U. S. 10, 24 L. ed. 333. <sup>93</sup> *Equity Rule 56.*

<sup>91</sup> *Longworth v. Taylor* (1839) 1 McLean 514.

**§ 612. New Process on Supplemental Proceedings after Decree.**

After a decree disposing of the issues in a suit and adjudicating the rights of the parties, new process is necessary before one of the parties to the previous suit can obtain relief upon new proceedings connected with the subject-matter of the original litigation.<sup>24</sup>

<sup>24</sup> *Smith v. Woolfolk* (1885) 115 U. S. 143, 29 L. ed. 357.

## CHAPTER XIV.

### INSTITUTION OF THE SUIT (*continued*).

#### *Substituted Service.*

- § 613. Service of Subpoena or Copy of Bill on Attorney or Agent.
- 614. Substituted Process Not Permissible in Original Proceeding.
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#### *Substituted Service.*

- § 613. Service of Subpoena or Copy of Bill on Attorney or Agent.

In the preceding pages we have considered the procedure by which the court obtains jurisdiction over a party as a defendant in an original proceeding. We are now to treat of the device of substituted process by which the court is able to subject to its authority persons

who are or have been already before it in some original proceeding upon which the new proceeding is dependent. Substituted process is obtained by service of a subpoena or a mere copy of the bill on the attorney, solicitor, or counsel of record, who represents or represented, in the original proceeding, the party whom it is desired to bring in, or upon some other agent of the person intended to be served. Such representative is here treated as the substitute or agent of his client for the purpose of the service of the process.<sup>1</sup>

<sup>1</sup> Smith Chancery Practice (2d ed.) 116: "Under certain special circumstances the court will allow the general rule which requires a subpoena to be served either personally, or at the dwelling-house of the defendant, to be dispensed with, but an order must be obtained for the purpose, which is granted on a special application: thus, if the plaintiff at law is abroad, the plaintiff in equity is entitled to an order, which is granted upon an affidavit of the truth of his bill, that service of the subpoena to appear on his attorney in the action at law may be deemed good service on him."

<sup>1</sup> Daniell Chancery Practice 268: "It seems that, in cases where the party out of the jurisdiction has appointed another to act as his agent in respect of the property which is the subject-matter of the suit, and such agent has been made a party to the suit, for the purpose of serving him with an injunction to restrain his dealing with such property, the court has permitted service of the subpoena upon the agent, to be considered good service upon his employer."<sup>2</sup>

In federal courts substituted process is commonly resorted to in suits of a dependent or ancillary character, as in cross suits to enjoin the execution of judgments at law obtained in the same court. In such suits the process may be served upon the attorney or counsel of record, in the principal suit, of the party who is to be brought in; or it can be served upon the party himself outside the district where the litigation is pending. And it may be served by the marshal of any district where the party may be found. The practice is permissible in any proceeding of an ancillary nature.<sup>3</sup>

<sup>1</sup> *Dunn v. Clarke* (1834) 8 Pet. 1, 3. <sup>2</sup> See post, § 622. *Read v. Consequa* 8 L. ed. 845, 846; *Minnesota Company v. St. Paul Co.* (1864) 2 Wall. 609, 633, 17 L. ed. 886, 895; *Gregory v. Pike* (C. C. A.; 1897) 25 C. C. A. 48, 79 Fed. 520. <sup>3</sup> *Weymouth v. Lambert* (1840) 3 Beav. 333; *Hope v. Hope* (1854) 4 De G. M. & G. 328, 19 Beav. 237; *Hyde v. Forster* (1745) 1 Dick. 102; *Webb v. Salmon* (1844) 3 Hare 251, 255; *English v. Hendrick* (1821) 6 Madd. 205; *Hobhouse v. Courtney* (1841) 12 Sim. 140, 157, 6 Jur. 28.

**§ 614. Substituted Process Not Permissible in Original Proceeding.**

Upon an original bill, substituted service on an attorney or agent is not permissible at all. In a case where the defendants absconded to avoid service and continued to live out of the jurisdiction, the plaintiff moved the court to order substituted service on their agent in charge of the particular property that was desired to be reached. But it was held that the mere fact that the defendants in an original proceeding could not be reached by ordinary means did not give the court power to authorize service by extraordinary means.<sup>4</sup>

*Hitner v. Suckley* (1810) 2 Wash. C. C. 465, Fed. Cas. No. 6,543: One S., as holder of the legal title to land, brought an action at law against H. for slander of title. H., claiming an interest as mortgagee, thereupon filed a bill in equity against S. to enjoin him from committing waste on the same land. It was held that the two suits were entirely independent, and a motion for substituted service was denied.

**§ 615. Nature and Origin of Substituted Process.**

Substituted process appears upon examination not to be a form of true legal process at all. It is merely a species of notice. When a party is once in court in connection with a suit prosecuted by or against himself, he is subject to the jurisdiction of the court; and this jurisdiction extends to all matters subordinate to and growing out of that suit. All that the party is thereafter entitled to is notice of the different steps taken in the suit. Therefore, when an ancillary proceeding is instituted, no process is necessary at all; and this serving of substituted process on the attorney is merely a convenient, safe, and necessary means of affecting the real party with notice of the new proceeding.<sup>5</sup>

The practice of allowing substituted process undoubtedly had its beginning in the practice in respect to orders and notices connected immediately with the litigation. So many steps are taken in equity suits of which notice is required to be given that, from the necessity of the case, notice to the solicitor of the adversary party must often be deemed sufficient. Not only is this convenient to all concerned. It also makes proceedings less expensive and makes progress in the litigation possible. Notices to produce papers, take depositions, and other steps of like nature are constantly served on the opposing solicitor. Beginning with the idea underlying this practice, the

<sup>4</sup> *Hyslop v. Hoppock* (1872) 5 Ben. 533, Fed. Cas. No. 6,989.      <sup>5</sup> See *Maitland v. Gibson* (1897) 79 Fed. 136.

courts have gone further, and have allowed substituted service in proceedings connected with the original litigation but not identical with it. The extreme limit of this power is found in the principle that the substituted service is only admissible where the second suit is dependent on the previous suit and ancillary to it. But within this extreme limit the practice is not uniform. The more liberal view would permit the granting of an order for substituted service in any ancillary proceeding where the party who is intended to be brought in cannot be otherwise reached. The narrower view would limit it to matters more closely connected with the principal suit. On the whole it is certain that the limit of the possible exercise of the power is a matter largely of judicial discretion.<sup>6</sup> The practice becomes more liberal in the later decisions, yet no generally accepted principle has been deduced as governing the allowance of applications for substituted process.

Sometimes the English courts, instead of allowing an order for substituted process, have merely ordered, in cases of cross suits and injunction suits against judgments at law, that the original proceedings be stayed until the plaintiff therein should come in and submit to the jurisdiction in respect to the cross proceedings or injunction.<sup>7</sup> This course is not commonly followed in the federal courts; as our judges would undoubtedly allow substituted process in any suit where they would feel justified in staying the original proceedings.

#### § 616. Practice in Obtaining Order for Substituted Process.

The usual practice where substituted service is desired is for the party to apply for an order of court permitting such service. If the court, in its discretion, grants the order, the subpoena or other notice prescribed by the court is served on the attorney or other agent representing the party in interest, and the proceeding goes on in the ordinary course of litigation. As the court has the power to grant the order for substituted service in the first instance, practitioners have sometimes supposed that it would be permissible to go ahead, without the preliminary order of the court, and serve the substituted process at once, the idea being that if the service should be questioned the court could be induced, in the exercise of its discretion, to sustain the service first had without the order of the court. If a court can authorize substituted process, it would apparently have the power in

<sup>6</sup> *Gregory v. Pike* (C. C. A.; 1897) 25    <sup>7</sup> 1 Dan. Ch. Pr. 263.  
C. C. A. 48, 79 Fed. 520.

a proper case to ratify the service of such process already had.<sup>8</sup> The practice is, however, a rather dangerous one, and the cautious lawyer will seldom resort to it. When asked about the matter beforehand, a court may conceivably be induced to make the requisite order, whereas, if the practitioner has already gone ahead with the service of substituted process on his own responsibility, the court may not be so kindly disposed.<sup>9</sup>

An order for substituted service will not be granted before the bill upon which such service is desired has been filed.<sup>10</sup>

### § 617. Application for Order—Affidavit.

The motion for substituted service is generally made *ex parte* and without notice. It was formerly required in the English practice that the application for the order should be supported by an affidavit verifying the facts stated in the bill. This affidavit should be made by the plaintiff himself. Unless the solicitor had personal knowledge of the merits of the cause, his affidavit was not sufficient. While a material variance between the affidavit and the bill would be fatal, it was not expected that the affidavit should enumerate and verify all the allegations of the bill with special precision. It was enough if the affidavit substantiated the main facts on which the equity of the bill depended.<sup>11</sup>

The federal courts apparently do not insist on the affidavit of merits, but no doubt it is proper that the application should be accompanied by an affidavit showing why the service of substituted process is desirable and necessary.<sup>12</sup>

<sup>8</sup> For instances of this practice see *Abraham v. North German Fire Ins.* (1889) 3 L.R.A. 188, 37 Fed. 731. Compare *Maitland v. Gibson* (1897) 79 Fed. 136.

<sup>9</sup> See *Pacific Railroad v. Missouri Pac. R. Co.* (1880) 1 McCrary 647, 3 Fed. 772; *Gregory v. Pike* (C. C. A., 1897) 79 Fed. 520, 25 C. C. A. 48. In the latter case service was made on counsel in lieu of service on the appellant, without a prior order of the court allowing the substitution. It was held that this was not allowable and that the service was void. It should be added that the court thought that the case was one where substituted process ought not to be used at all, and the decision was not based wholly on the irregularity of the service.

An application for an injunction can-  
Eq. Prac. Vol. 1.—25.

not be made, in a case where substituted service is permitted, until the order for such service has been granted and possibly until after the subpoena has been served on the attorney; for notice of the application for an injunction is necessary in the federal courts in all cases, and until the service is had there is no one to whom notice can be given. *Kamm v. Stark* (1871) 1 Sawy. 547, Fed. Cas. No. 7,604.

<sup>10</sup> *Ward v. Seabry* (1823) 4 Wash. C. C. 426, Fed. Cas. No. 17,161.

<sup>11</sup> 1 Dan. Ch. Pr. 263, 264.

<sup>12</sup> In the later editions of Mr. Daniell's work it is stated that the affidavit accompanying the application for an order of substituted service should merely show that it is impossible to serve the defendant, etc. 1 Dan. Ch. Pl. & Pr. (6th ed.) 449,



**618. Service of Copy of Order.**

When an order is granted permitting the service of substituted process, the order should provide for the service of a copy of the order itself, to be made at the same time as process is served.<sup>13</sup> The purpose of this is that the person served may thereby be admonished that the service is valid. Care must be taken that the substituted service is effected in entire conformity with the terms of the order.<sup>14</sup>

A vacation of an order for substituted service can be subsequently allowed by the court allowing the order where it appears that the order was unadvisedly granted.<sup>15</sup>

**§ 619. Service on Defendant out of District.**

In granting an order allowing substituted process on an attorney or agent, the court may also direct that a subpoena be served on the party wherever he may be found. This is merely an extra precaution, calculated to guard against surprise. Such a subpoena served on the party is not an original process constituting the basis of the court's jurisdiction. It is only a species of notice, and it may be served out of the district.<sup>16</sup>

**§ 620. Authority of Counsel as Affecting Validity of Service.**

For the purpose of receiving notice of an ancillary suit, a party to the principal suit is represented by his counsel or attorney of record in the principal suit; and it is the duty of such attorney upon receiving the notice to bring it to the attention of his client. This legal duty on the part of the attorney is not affected by the circumstance that the relation of attorney and client may have been actually terminated as between the parties. It springs from the relation occupied by them in the original suit and their relation on the record.<sup>17</sup> Nor is it material that the original retainer of the attorney extended only to the particular suit and was not a general retainer. The original retainer in a suit extends to all proceedings that immediately affect the right of the client to recover the property in controversy in that suit or to enforce the judgment when recovered.<sup>18</sup>

Before substituted service on an attorney, not followed by an actual

<sup>13</sup> 1 Dan. Ch. Pl. & Pr. (6th ed.) 449.

<sup>14</sup> 1 Dan. Ch. Pl. & Pr. (6th ed.) 449.

<sup>15</sup> Fidelity Trust & Safety Vault Co.

v. Mobile St. Ry. Co. (1893) 53 Fed.

850, reversed Gasquet v. Fidelity Trust

& Safety Vault Co. (1893) 57 Fed. 90, 6 C. C. A. 253.

<sup>16</sup> The Cortes Co. v. Thannhauser

(1881) 9 Fed. 226; Chittenden v. Thann-

hauser (1881) 9 Fed. 226.

<sup>17</sup> Cortes Co. v. Thannhauser (1881)

9 Fed. 226.

<sup>18</sup> Crellin v. Ely (1892) 13 Fed. 420.

appearance of the party, can be sustained, it must appear that the attorney in question was the attorney of the particular party on whom service is sought to be effected.<sup>19</sup>

### § 621. Termination of Authority of Attorney.

The authority of the attorney which is presumed to exist as long as the judgment is in force terminates when the judgment is satisfied, and thereafter substituted service on the attorney in reference to matters connected with that judgment cannot be permitted. The circumstance that the attorney as a matter of fact continues to represent the party under a general retainer does not affect the case, his legal connection with the former suit being ended.<sup>20</sup>

### § 622. Substituted Service in Cross Suit.

The cross suit, or suit begun by cross bill, is a proceeding in which the service of substituted process is often permitted;<sup>21</sup> but in the absence of an order permitting substituted service, a new subpoena should be issued upon a cross bill introducing new matter and asking for affirmative relief the same as upon an original bill.<sup>22</sup>

Before substituted process will be permitted on a cross bill it must appear that the cross bill contains matter proper for a cross bill. In other words, the cross bill must be germane to the original bill.<sup>23</sup> Under a bill calling itself a cross bill, but which is in reality an original bill, because it sets up matters not germane to the original suit, substituted service will not be allowed. Such a bill is in substance an original bill.<sup>24</sup>

Substituted process will be permitted on a germane cross bill filed

<sup>19</sup> *Smith v. Woolfolk* (1865) 115 U. S. 143, 29 L. ed. 357.

<sup>20</sup> *Kamm v. Stark* (1871) 1 Sawy. 547, Fed. Cas. No. 7,604.

<sup>21</sup> *Gregory v. Pike* (1886) 29 Fed. 588; *Dunlevy v. Dunlevy* (1889) 38 Fed. 459; *Lowenstein v. Glidewell* (1878) 5 Dill. 325; *Eckert v. Bauert* (1823) 4 Wash. C. C. 370; *Ward v. Sebring* (1824) 4 Wash. C. C. 472; *Hitner v. Suckley* (1810) 2 Wash. C. C. 465.

Instead of allowing substituted process in cross suits, it used to be the practice in the English chancery to suspend proceedings in the original cause till the plaintiff had answered the cross bill. 1 Dan. Ch. Pr. 267.

<sup>22</sup> *Gregory v. Pike* (C. C. A.; 1897) 79 Fed. 520, 25 C. C. A. 48; *Lowenstein v. Glidewell* (1878) 5 Dill. 327.

In Illinois the cross bill is considered an adjunct or part of the original suit and no process is necessary to bring in the parties to the original bill, whether infant or adult. *Kingsbury v. Buckner* (1890) 10 Sup. Ct. 638, 134 U. S. 650, 33 L. ed. 1047.

<sup>23</sup> *Schenck v. Peay* (1868) Woolw. 175.

<sup>24</sup> *Heath v. Erie R. Co.* (1872) Fed. Cas. No. 6,307; *Ward v. Seabry* (1825) 4 Wash. C. C. 426, Fed. Cas. No. 17,161; *Eckert v. Bauert* (1823) 4 Wash. C. C. 370, Fed. Cas. No. 4,266.

by an intervening creditor, on the same considerations as if it had been filed by a party defendant to the original bill.<sup>25</sup>

Substituted service on a cross bill will not be ordered where the adversary party comes forward and by voluntary stipulation gives the defendant the benefit of the relief he could obtain by the cross bill.<sup>26</sup>

### § 623. Cross Bill between Co-defendants.

The appearance of a defendant to a cross bill, as between co-defendants, should be enforced in the same manner as the appearance of a defendant to an original bill;<sup>27</sup> though no doubt, in a proper case, an application for substituted process might be granted in the discretion of the court.

### § 624. Substituted Process Available in Any Ancillary Suit.

According to the early practice of the federal courts the use of substituted process was limited, in conformity with the rule of English practice, exclusively to cross bills and suits for injunction against judgments at law. This rule is not now followed in our courts, and under the existing practice an order for substituted service may be granted in any equitable proceeding that is a dependency on another suit or action in which the court has acquired, and has, jurisdiction over the party on whom the process is to be served. It is available in any ancillary proceeding, where such substitution is necessary to enable the court to proceed in the matter.<sup>28</sup>

1. *Ward v. Seabring* (1824) 4 Wash. C. C. 472, Fed. Cas. No. 17,160: Pending an action in ejectment the plaintiff filed a bill, the purpose of which was to obtain discovery in respect to the land in controversy. Washington, Circuit Justice, refused a motion for substituted service, partly on the ground that the practice was strictly limited to cross bills and suits for injunction against judgments at law.<sup>29</sup>

[This is in conformity with the former English practice. Mr. Daniell says that as a general rule substituted process against a person out of the jurisdiction of the court will be permitted only in injunction cases.<sup>30</sup> This notion is long since obsolete, and the practice followed in this case is not now in vogue.]

<sup>25</sup> *Gasquet v. Fidelity Trust & Safety* (1885) 115 U. S. 143, 29 L. ed. Vault Co. (1893) 57 Fed. 80, 6 C. C. 357; *Meyer v. Kuhn* (C. C. A.; 1895) 13 A. 253, *reversing* *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.* (1893) 53 Fed. 850. C. C. A. 298, 65 Fed. 705, 711.

<sup>26</sup> *Heath v. Erie R. Co.* (1872) 9 Blatchf. 318, Fed. Cas. No. 6,307. <sup>28</sup> On the question as to what suits are ancillary suits, see *post*, chapter XXIX.

<sup>27</sup> *Railroad Co. v. Bradley* (1869) 10 Wall. 290, 19 L. ed. 894; *Smith v. Wool-* <sup>29</sup> Compare *Eckert v. Bauert* (1823) 4 Wash. C. C. 370, Fed. Cas. No. 4,900. <sup>30</sup> Dan. Ch. Pr. 268.

2. *Abraham v. North German Fire Ins. Co.* (1889) 3 L.R.A. 188, 37 Fed. 731: An action at law was brought on a fire insurance policy. On demurrer it appeared that the action could not be maintained without first obtaining a reformation of the policy. Accordingly the action at law was continued, and a bill in equity was filed in the same court for reformation. It was held to be a proper case for substituted process. The court said: "The bill is in aid of the action at law. It is between the parties to the law action, and is dependent upon and auxiliary thereto, in such sense that service upon the attorneys charged with the duty of defending the law action may be had where such service cannot be made directly upon the party."

A petition to reach and subject a patent right, alleged to belong to the adversary party, to the payment of costs in a previous suit is merely a part of or a continuation of the previous suit; and original process is not necessary. Service of the bill on the attorney is enough.<sup>30</sup>

#### § 625. Form of Bill as Affecting Right to Substituted Process.

If a proceeding is really dependent on another suit so as to justify the prosecution of it without original process, the fact that it is put into the form of an independent, original bill does not result in making original process necessary. It may still be prosecuted by notice, or substituted process.<sup>31</sup>

#### § 626. Equity of Bill as Affecting Right to Substituted Process.

Substituted process will not be ordered on a bill which so far shows a want of equity on its face that the defendant, if brought in, would only have to demur in order to secure a dismissal of the bill. Thus in a case where it was sought to set aside a judgment at law which had already been satisfied, the only ground of relief set forth was that the original suit at law had been collusively made. It was held that such objection to the jurisdiction was not available after the suit was terminated and that the bill was lacking in equity. Substituted process was accordingly denied.<sup>32</sup>

#### § 627. Testing Validity of Substituted Service.

If a party against whom an order for substituted service is made wishes to test its validity he must appear specially and move to vacate

<sup>30</sup> *Maitland v. Gibson* (1897) 79 Fed. (1864) 2 Wall. 609, 633, 17 L. ed. 886, 136. 805.

<sup>31</sup> *Maitland v. Gibson* (1897) 79 Fed. <sup>32</sup> *Muhlenburg County v. Citizens'* 136; *Minnesota Co. v. St. Paul Co. Nat. Bank* (1894) 65 Fed. 537.

or dismiss the service. A motion to set aside the subpoena is not the proper proceeding in such case. It is the service, not the subpoena, that gives the ground for complaint.<sup>23</sup>

*Statutory Substitute for Service.*

**§ 628. Service of Court Order—Publication.**

In a limited class of cases personal service of a court order, or publication of notice of a court order, requiring the defendant to come in and defend, is permitted to serve the purpose, in a measure, of actual original process. The suits in which this is permitted, by statute, are those brought in circuit courts to enforce a lien upon, or claim to, the title of property, real or personal, or to remove an incumbrance, lien, or cloud from the title to such property. The statute now in force on this subject provides as follows:<sup>24</sup>

Act of March 3, 1875, ch. 137, sec. 8: When in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district, and when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the

<sup>23</sup> *Mason v. New York, etc. Co.* (1898) 87 Fed. 241.

<sup>24</sup> The first statute on this subject appeared in the Act of June 1, 1872, ch. 255, sec. 13, 17 Stat. L. 188. This law was with some modification carried into the Revised Statutes as section 738,

and was superseded by that section. This section was in turn superseded by the act now in force. The latter statute made some changes in, and contained some material additions to, the prior law.

same state, said suit may be brought in either district in said state. Provided, however, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.<sup>35</sup>

### § 629. General Construction and Application of Statute.

In applying this statute it is to be borne in mind generally that, as it provides for an unusual substitute for service, it should be closely followed.<sup>36</sup> It applies only in suits originally begun in the circuit courts and not to causes removed thereto from state courts.<sup>37</sup> The statute is not applicable to proceedings in district courts.<sup>38</sup> The mode prescribed in the statute is exclusive, and a different practice based on state laws can have no validity in the federal courts.<sup>39</sup>

If two causes of action are joined in one bill, and one of them is of such nature as to justify substituted service of a court order, but the other is not, the court cannot obtain jurisdiction of the latter cause by service of the order.<sup>40</sup>

### § 630. Case of Defendant Residing in District but Not Found.

An important point to be considered in regard to the effect of this statute is the meaning of the language defining the conditions under which the procedure therein prescribed is proper. The words are: "When one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto." These words apparently authorize the making of the order in either of two contingencies, namely, (1) when a defendant, being a nonresident, fails to appear voluntarily, and (2) when a defendant, being an inhabitant of the district, cannot be found therein and does not voluntarily appear. In other words, the statute may be pursued in a case where the defendant whom the plaintiff seeks to

<sup>35</sup> 18 Stat. L. 472; 4 Fed. Stat. Ann. 381.

<sup>37</sup> *Woolridge v. McKenna* (1881) 8 Fed. 680.

<sup>36</sup> *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.* (1891) 139 U. S. 137, 147, 35 L. ed. 116, 118, 11 Sup. Ct. 512; *McCoy's Ex'r v. McCoy's Devisees* (1876) 9 W. Va. 443; *Hoffman v. Shields* (1870) 4 W. Va. 447.

<sup>38</sup> *Shainwald v. Lewis* (1880) 5 Fed. 517; *in re Waukesha Water Co.* (1902) 116 Fed. 1011.

<sup>39</sup> *Bracken v. Union Pac. R. Co. (C. A.)* (1893) 5 C. C. A. 548, 56 Fed. 496; *Batt v. Procter* (1891) 45 Fed. 515; *Evans v. Charles Scribner's Sons* (1893) 58 Fed. 303.

<sup>40</sup> *Bracken v. Union Pac. R. Co. (C. C.)* (1893) 5 C. C. A. 548, 56 Fed. 447.

bring in is an inhabitant of the district as well as where he is a nonresident, provided the other conditions are such as are mentioned in the statute. No other meaning can be fairly given to this language. The original statute of 1872 was identical in wording, and Judge Dillon, who was then a circuit judge, understood the statute to apply to resident defendants who could not be found in the district, as well as to nonresident defendants.<sup>41</sup> Evidently this language is to be construed as if it read, "if one or more of the defendants shall either be a nonresident of the district or, being a resident, shall not be found therein, or shall not voluntarily appear."

In carrying this section of the Act of 1872 into the Revised Statutes, the language of the statute was materially changed on this point. The corresponding words of section 738 R. S. are these: "When any defendant is not an inhabitant of nor found within the said district, and does not voluntarily appear." Here, it will be perceived, "or" is changed to "nor," and in consequence the section must here be construed as if it read, "when any defendant is neither an inhabitant of the district, nor is found in it, nor voluntarily appears;"<sup>42</sup> or as if it read, "when any defendant is not an inhabitant of the district and is not found within it and does not voluntarily appear." Under the Act of 1872, the procedure could be adopted if either of the alternatives were fulfilled; under section 738 R. S., the procedure could not be adopted unless all the conditions were fulfilled. Here the defendant must be a nonresident; the plaintiff must be able to show that the defendant cannot be found in that district; and the defendant must not voluntarily appear. The alternative conditions stated in the earlier statute and connected by "or" have given place to a distributive negation stating cumulative conditions all of which must be fulfilled before the statute can operate.

However, as was indicated above, section 738 R. S. was superseded by the law now in force; and this latter statute, on the point under consideration, reverts to and re-enacts the words of the original statute. It follows that if our interpretation of the language in question is correct, a defendant may now be brought in by service of notice of a court order, or by publication, though he is a resident of the district, just as could be done under the original act. All that is necessary to show is that he cannot be found in the district and that he

<sup>41</sup> *Bronson v. Keokuk* (1873) 2 Dill. 498. found within the district, may be cited to appear." See *Greeley v. Lowe* (1894)

<sup>42</sup> The supreme court construed section 738 R. S., as if it read, "defendants who are neither inhabitants of, nor found within the district, may be cited to appear." See *Goodman v. Niblack* (1890) 102 U. S. 556, 26 L. ed. 229.

does not voluntarily appear. There would seem to be no doubt that such is the true doctrine, though the rule here stated is doubtless contrary to a few dicta.

**§ 631. Statute Does Not Dispense with Jurisdictional Requirement.**

What is here said as to the possibility of thus bringing in resident defendants who cannot be found must, of course, be taken subject to the qualification that in suits where jurisdiction rests on the diversity of citizenship, the citizenship of all the parties must be such as to give the court jurisdiction of the cause; for, it will be observed, while the present law permits a suit to be brought against a defendant in a district other than that in which he resides,<sup>43</sup> it does not change the rule that to entertain jurisdiction on the ground of diverse citizenship, all the plaintiffs must be citizens of different states from the defendants.<sup>44</sup> For instance, a citizen of the state of Maine could unite with a citizen of New York and bring a suit in the circuit court of Massachusetts to enforce a lien on property located there, the resident owners being made defendants. In such a suit nonresident owners, living in other states than Maine and New York, could also be made defendants; and in either case the defendants, resident or nonresident, could be brought in by publication. But if a citizen or citizens of Massachusetts bring a bill in the circuit court of that state to enforce a lien on property situated there, no resident owner could be made a defendant or be brought in by publication, for this would destroy the jurisdiction of the court.

**§ 632. Citizenship Unknown—Residence Unknown.**

Furthermore, it is manifest that a person whose citizenship is alleged to be unknown cannot be brought in by publication under the act, for the federal court cannot have jurisdiction, in a case resting on diversity of citizenship, unless the citizenship of each party is stated.<sup>45</sup> But if the necessary allegation of citizenship in a particular state is made in regard to a defendant, it would be entirely

<sup>43</sup> *Greeley v. Lowe* (1894) 155 U. S. 58, 39 L. ed. 69 (*distinguishing* *Smith v. Lyon* (1890) 133 U. S. 315, 33 L. ed. 635); *Ames v. Holderbaum* (1890) 42 Fed. 341; *Seybert v. Shamokin, etc. R. Co.* (1901) 110 Fed. 810. Compare *Jenkins v. York Cliff Imp. Co.* (1901) 110 Fed. 807, 809, where the case was not one under sec. 738, but based on the general equity powers of the court.

<sup>44</sup> *Brigham v. Luddington* (1874) 12 Blatchf. 237, Fed. Cas. No. 1,874; *Ames v. Holderbaum* (1890) 42 Fed. 341; *Tug River, etc. Co. v. Brigel* (1895) 14 C. C. A. 577, 67 Fed. 625.

<sup>45</sup> *Tug River etc. Co. v. Brigel* (1895) 14 C. C. A. 577, 67 Fed. 625.



proper to bring him in by publication, upon a showing (1) that his actual place of residence in that state is unknown and (2) that it is impossible or impracticable to serve the notice on him personally.<sup>45</sup>

### § 633. Steps to Bring In Resident Defendant.

The steps to be taken by the plaintiff in order to bring in a defendant under this statute, or to give the court jurisdiction to proceed in the absence of such defendant, should differ somewhat, according as the defendant to be affected with notice is a resident or a nonresident of the state. If the bill shows on its face that the defendant is a resident of the state, a subpoena should be issued for him in the usual course. When the subpoena is returned "not found," the plaintiff may make his application to the court for the order provided for in the statute. This application may properly be made *ex parte*, and it is not necessary for the plaintiff to abide a term to see whether or not the defendant will in the meantime come in voluntarily. It would be unreasonable to expect the plaintiff to delay proceedings in order to give the defendant a chance voluntarily to appear.<sup>46</sup> The return of the subpoena "not found" is sufficient evidence that the defendant is not to be found in the district; and accordingly when the application is based on such a return, it could hardly be considered necessary that the application should be verified or that it should be accompanied by an affidavit showing that the defendant is not to be found therein.

### § 634. Steps to Bring In Nonresident Defendant.

If the defendant whom the plaintiff wishes to bring in is a nonresident of the district and this fact is alleged, as it should be, in the bill, the issuance of a subpoena would be idle, since a subpoena has no validity beyond the limits of the territorial jurisdiction of the court. Therefore, in this case, the plaintiff should, or may, apply for a special court order without unnecessary delay.<sup>48</sup>

<sup>45</sup> In *Batt v. Procter* (1891) 45 Fed. 315, defendants were alleged to be non-residents, and it was shown that their places of abode were unknown. The order for publication was refused because it was not sufficiently shown that service of the notice could not be had under the statute. These defendants seem to have been residents of the state; but the exact conditions are not disclosed. Assuming that the suit was brought by a citizen of another state and that the defendants were alleged to be citizens of the state, it would be entirely proper thus to bring them in.

In *Bronson v. Keokuk* (1873) 2 Dill. 498, it appears to have been taken for granted that defendants whose residence was unknown could be brought in under

<sup>47</sup> *Contra*, *Bronson v. Keokuk* (1873) 2 Dill. 498.

<sup>48</sup> *United States v. American Lumber Co.* (1897) 80 Fed. 309.

### § 635. Proof Accompanying Application.

This application should be accompanied by an affidavit, or some other proof sufficient to show that the order is proper. The statute is silent on the subject of the evidence necessary to authorize the making of the order. Clearly, this evidence may be supplied in any mode recognized by the practice of the court as sufficient. The return of a subpoena "not found" is not the only evidence that will authorize the court to proceed. It may be supplied by affidavit or oral proof.<sup>49</sup>

### § 636. Order Not Subject to Collateral Attack.

As it is in the power of the court, by which the order is made, to determine whether a proper case is presented for the making of a special order, its action in refusing the order cannot be collaterally assailed, especially where the record does not contain the evidence on which the ruling was based. It will be presumed that the finding of the court was supported by sufficient and competent proof.<sup>50</sup>

### § 637. Order for Defendant to Appear.

The first order granted by the court under the statute is one to the effect that the defendant shall appear and plead, answer, or demur, by a specified day. Any convenient day may be designated. It is not necessary that this day should be a rule day.<sup>51</sup> The order should specify the mode in which it is to be executed and the particular parties.

### § 638. Order of Publication.

If service of this order is impossible or impracticable the court proceeds to authorize publication. Before a plaintiff can proceed to publication or obtain an order for publication, he must comply with all the previous statutory conditions and limitations. A failure to do so is not excused by the fact that the expense attending those steps would be great or that the number of the defendants is large.<sup>52</sup>

Infants can be proceeded against by publication whenever the statutes permit such process against adults.<sup>53</sup>

<sup>49</sup> Forsyth v. Pierson (1882) 9 Fed. order is not granted or served until 801; Woods v. Woodson (1900) 40 C. C. after a *pro confesso* has been ordered. A. 525, 100 Fed. 518. See Mellin v. Moline Iron Works (1889)

<sup>50</sup> Woods v. Woodson (1900) 40 C. C. 131 U. S. 370, 33 L. ed. 184.

A. 525, 100 Fed. 515, 518.

Proceedings under the statute may be sustained where a defendant is served with a court order to appear and defend before the final decree, though the

<sup>51</sup> Forsyth v. Pierson (1882) 9 Fed. 801.

<sup>52</sup> Batt v. Procter (1891) 45 Fed. 515.

<sup>53</sup> Bryan v. Kennett (1885) 5 Sup. Ct. 407, 113 U. S. 179, 28 L. ed. 908.

**§ 639. Requisites of Publication.**

Publication is not valid where it fails to conform strictly to the statute. It must extend over the full period of six weeks,<sup>54</sup> and it is essential that the publication should correctly state the parties to the suit and their names. Publication has been held to be fatally defective where the order of publication as entered and published ran, "Sarah E. Myers and the unknown heirs of Henry Myers, deceased," while it should have been "Elizabeth Meyer and the unknown heirs of Henry Meyer, deceased."<sup>55</sup>

<sup>54</sup> Guaranty Trust, etc. Co. v. Green (1893) 54 Fed. 1, 9; Meyer v. Kuhn Cove Springs, etc. R. Co. (1891) 139 U. (C. C. A.; 1895) 13 C. C. A. 298, 65 S. 137, 35 L. ed. 116. Fed. 705.

<sup>55</sup> Detroit v. Detroit City R. Co.

## CHAPTER XV.

### APPEARANCE OF DEFENDANT.

#### *In General.*

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- 641. Authority of Solicitor to Appear.
- 642. Appearance of Person under Disability.
- 643. Appearance of Married Woman.
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### *In General.*

#### § 640. Appearance, Formal and Informal.

After a defendant has been duly served with process he must put in an appearance in the court. This formal act is desirable as a symbol of the completion of the steps required to perfect the jurisdiction of the court; and from the standpoint of the defendant, it is necessary as a prerequisite to the making of a defense.<sup>1</sup>

The appearance, when formally made, should be in writing and duly filed. It should be headed by the name of the particular court and the style of the cause in which the appearance is made. A simple direction to the clerk to enter the appearance of the person giving the authority is enough, where such person is one of the defendants himself. If the appearance is made by a solicitor on behalf of one or more of the defendants, it should be so noted.<sup>2</sup> Though equity rule 17 provides for the formal entry of the defendant's appearance in the order book, appearances are rarely entered with much formality. The defendant or more usually his solicitor simply enters his name on the docket as appearing in the cause. If the defendant comes into court and files a pleading or takes any other proper step looking towards his defense, this of necessity operates as an appearance on his part, though no formal appearance whatever is entered by him or by his solicitor.

#### § 641. Authority of Solicitor to Appear.

Though an appearance by an attorney or solicitor is not binding unless the attorney is authorized to appear, it is not necessary that the authority should be affirmatively shown. The lawyer is an officer of the court and is admitted to practice under the authority of the law. Consequently, until the contrary is shown, his appearance in a cause will be presumed to be with the sanction of the person whom he assumes to represent.<sup>3</sup> The authority of an attorney to appear for a

<sup>1</sup> 2 Dan. Ch. Pr. 4. Under the practice of the High Court formal appearance of the defendant was of much greater importance than in modern practice. Court of the First Circuit requires that the appearance shall be made "in writing by the hand of the person appearing."

<sup>2</sup> No. 5 of the Rules of the Circuit      <sup>3</sup> *Osborn v. Bank of U. S.* (1824) 9

corporation need not be under seal.<sup>4</sup> A decree against a defendant, upon an appearance for him by an attorney of record, does not preclude such defendant from showing in a subsequent proceeding that the appearance was unauthorized.<sup>5</sup>

### § 642. Appearance of Person under Disability.

An infant is lacking in capacity to make a personal appearance.<sup>6</sup> He must appear by his guardian *ad litem*.<sup>7</sup> An appearance for an infant made by one having no lawful authority to represent the infant gives no jurisdiction, and the decree entered upon such unauthorized appearance is not binding.<sup>8</sup>

An idiot or a lunatic appears by his committee or other specially appointed guardian *ad litem*.<sup>9</sup>

### § 643. Appearance of Married Woman.

The wife who is sued conjointly with her husband appears by him. Hence, if a husband and wife are served with a subpoena, a separate appearance by the wife is usually irregular. The husband should appear for both. If the husband alone is served with process without the wife and he has notice that the wife is a defendant, he may likewise appear for both.<sup>10</sup>

Where the wife is sued separately, as she is when the husband is abroad or when the suit concerns her separate property, she appears separately. The rules here stated in regard to the appearance of the wife represent the practice followed in the English chancery at the beginning of the last century, and it is presumed that they would be followed in the federal courts of equity, there being no local rules to the contrary.

### § 644. Appearance Day.

An appearance may be put in *gratis* by a defendant at any time after the suit has been brought, if he sees fit to do so; but if, as is usually the case, he does not desire thus voluntarily to submit to the

Wheat. 829, 6 L. ed. 225; Baldwin v. Sliver v. Shelback (1786) 1 Dall. 165, 1 L. ed. 84.

Bank of the United States v. Roberts 7 2 Dan. Ch. Pr. 6.

(1822) Fed. Cas. No. 934.

Osborn v. Bank of U. S. (1824) 9 266, affirmed (1895) 33 L.R.A. 759, 68 Fed. 43, 15 C. C. A. 201.

Wheat. 829, 6 L. ed. 225.

Hatch v. Ferguson (1893) 57 Fed. 966.

2 Dan. Ch. Pr. 6.

2 Dan. Ch. Pr. 5; 1 Smith, Ch. Pr. 2d ed. 145.

jurisdiction of the court, he waits, or can wait, until the appearance day. On this day he must appear, if he has not already done so.<sup>11</sup>

The appearance day is determined by reference to the date of the return day and the time of the actual service of the writ. If the subpoena is served as much as twenty days before the return day, then the appearance day coincides with the return day. If the subpoena is not served as much as twenty days prior to the return day, then the appearance day falls on the rule day next succeeding the return day.<sup>12</sup>

If no formal appearance is put in and the defendant submits to the jurisdiction of the court by the filing of an answer or other pleading, as he may do, such pleading must be filed on or before the appearance day. In other words, the time within which a defendant may answer or plead is sensibly abridged when no formal appearance is entered. A defendant who has entered a formal appearance has until the next rule day to plead, but if he refrains from entering a formal appearance he must come in and appear informally by pleading within the time limited for appearing, otherwise he will be subject to the penalty imposed for a failure to appear.

#### § 645. Withdrawal of Appearance.

As a general rule the appearance of a defendant cannot be withdrawn without leave of the court.<sup>13</sup> This rule is designed for the benefit and protection of the plaintiff and not for the benefit of the defendant. Therefore, if a defendant, after having appeared, withdraws his appearance without leave of the court, he will be so far bound by this act that a judgment against him *pro confesso* may be supported.<sup>14</sup>

The withdrawal of a solicitor from all connection with a cause does not operate to withdraw an appearance already entered in that cause by such solicitor.<sup>15</sup> The withdrawal of a plea or answer by leave of the court does not withdraw the appearance,<sup>16</sup> especially where the withdrawal of the pleading is expressly without prejudice.<sup>17</sup>

<sup>11</sup> Heyman v. Uhlman (1888) 34 Fed. 686.

<sup>12</sup> Equity Rule 17.

<sup>13</sup> United States v. Curry (1848) 6 How. 106, 111, 12 L. ed. 363, 365.

<sup>14</sup> Rio Grande Irrigation Co. v. Gildersleeve (1899) 174 U. S. 603, 43 L. ed. 1103.

<sup>15</sup> Creighton v. Kerr (1873) 20 Wall. 13, 22 L. ed. 311.

<sup>16</sup> Eldred v. Michigan Ins. Bank (1873) 17 Wall. 545, 21 L. ed. 685; White v. Ewing (1895) 16 C. C. A. 296, 69 Fed. 451.

<sup>17</sup> White v. Ewing (1895) 16 C. C. A. 296, 69 Fed. 451.

The withdrawal of an appearance, by leave of court, operates to put the suit in the same state as if no appearance had been entered,<sup>18</sup> unless the order of withdrawal expressly purports to be "without prejudice to the plaintiff."<sup>19</sup>

### *General and Special Appearances.*

#### § 646. General Appearance.

There are two sorts of appearances, the general appearance and the special appearance. The distinction is one of very considerable importance, inasmuch as there are sundry defects and objections to the maintenance of a suit that are available only when the defendant appears specially. The general appearance is the appearance of a defendant without condition or qualification. Every unlimited appearance is a general appearance. The general appearance may be put in formally on the appearance day, as contemplated in equity rule 17, or it may result, by necessary implication, from the taking of any step, such as the filing of answer, which looks towards the making of a defense on the merits. If a party appears and seeks relief going to the merits, his appearance is general. "No words of reservation can make an appearance special which is in fact to the merits."<sup>20</sup>

#### § 647. Steps Importing General Appearance.

The putting in of a general demurrer to the merits operates as a general appearance, and waives defective service.<sup>21</sup> If a demurrer or any part of it goes to the merits or to the general jurisdiction of the court, the question of personal privilege or of defect in the service is waived.<sup>22</sup>

Similarly, one who appears and makes a motion to dismiss on two grounds, one of which goes to the merits, thereby waives all objection for want of proper service and process.<sup>23</sup> An appearance made for the purpose of obtaining an extension of time to demur, plead, or

<sup>18</sup> *First Nat. Bank v. Cunningham* 30 Fed. 348; (1891) 48 Fed. 510; *Graham v. Spencer* (1882) 14 Fed. 603.

<sup>19</sup> See *Creighton v. Kerr* (1873) 20 Wall. 8, 22 L. ed. 309.

<sup>20</sup> *Crawford v. Foster* (C. C. A.; 1898) 28 C. C. A. 576, 84 Fed. 939.

<sup>21</sup> *New Jersey v. New York* (1832) 6 Pet. 323, 8 L. ed. 414; *Wetzel etc. R. Co. v. Tennis Bros. Co.* (1906) 75 C. C. A. 266, 145 Fed. 458; *Friezen v. Alle-*

*mania Fire Ins. Co.* (1886) 30 Fed. 348; *Dallmeyer v. Farmers' etc. Co.* (1877) Fed. Cas. No. 3,546.

<sup>22</sup> *St. Louis, etc. R. Co. v. McBride* (1891) 11 Sup. Ct. Rep. 982, 141 U. S. 127, 35 L. ed. 659; *Lowry v. Tile, etc. Asso.* (1899) 98 Fed. 817.

<sup>23</sup> *Jones v. Andrews* (1870) 10 Wall. 327, 19 L. ed. 935; *Edgell v. Felder* (C. C. A.; 1897) 84 Fed. 69, 28 C. C. A. 382.

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answer, or to take such other action as defendant may be advised, is a general appearance.<sup>24</sup>

### § 648. Steps Not Importing General Appearance.

A defendant on whom no attempt has been made to serve process does not submit to the jurisdiction of the court by joining with a codefendant (who has been served) in a motion to ~~dismiss the service~~. Such an appearance, if an appearance at all, is a special appearance.<sup>25</sup> Nor will a nonresident corporation that cannot be served with process be held to have entered a voluntary appearance merely by reason of the fact that its lawyers come in on behalf of an actual party and assist in the defense, there being no intention on the part of the corporation to become a party to the suit.<sup>26</sup>

An appearance by a person who is not, properly speaking, a defendant to the suit, but upon whom the subpoena is improperly served, will not be considered a general appearance, although the motion made upon such appearance does not, in terms, purport to be made as upon a special appearance.<sup>27</sup>

A special appearance will not operate as a general appearance at the next term of the court, in the absence of the taking of some step sufficient to waive the special appearance. A state statute providing that a special appearance at one term shall operate as a general appearance at the next term will not be given effect in the federal courts.<sup>28</sup>

### § 649. Petition for Removal Not General Appearance.

A petition for removal filed in a state court does not constitute a general appearance such as will preclude the petitioner from subsequently making a special appearance in the federal court after removal and there moving to dismiss the service. The fact that the petition for removal is in general terms and does not purport to be a special appearance is immaterial.<sup>29</sup>

<sup>24</sup> *Hupfeld v. Automaton Piano Co.* (1893) 149 U. S. 194, 13 Sup. Ct. 859, (1895) 66 Fed. 788. 37 L. ed. 899; *Galveston, H. & S. A. Ry.*

<sup>25</sup> *Beck, etc. Co. v. Wacker, etc. Co. Co. v. Gonzales* (1894) 151 U. S. 498, (C. C. A.; 1898) 76 Fed. 10, 22 C. C. A. 14 Sup. Ct. 401, 38 L. ed. 248.

<sup>26</sup> *Peterson v. Morris* (1898) 98 Fed. 11. <sup>27</sup> *Bidwell v. Toledo Consol. St. Ry.* 48; *Spren v. Delsignore* (1899) 94 Fed. Co. (1896) 72 Fed. 10. 71; *Tortat v. Hardin Min. & Mfg. Co.*

<sup>28</sup> *Kentucky Silver Min. Co. v. Day* (1901) 111 Fed. 428. *Contra* (now overruled), *Edwards v. Insurance Co.* (1894) 20 Fed. 452; *Tall-*

<sup>29</sup> *Mexican Cent. R. Co. v. Pinkneyman v. Railroad Co.* (1891) 45 Fed. 156;

*Wabash, etc. R. Co. v. Brown* (1896) 17 Sup. Ct. 126, 164 U. S. 271, 41 L. ed. 431, *reversing* (1895) 13 C. C. A. 222, 65 Fed. 941: In discussing this point, Chief Justice Fuller said: "An appearance which waives the objection of jurisdiction over the person is a voluntary appearance, and this may be effected in many ways, and sometimes may result from the act of the defendant even when not in fact intended. But the right of the defendant to a removal is a statutory one, and he is obliged to pursue the course pointed out, and when he confines himself to the enforcement of that right in the manner prescribed, he ought not to be held thereby to have voluntarily waived any other right he possesses. An acknowledged right cannot be forfeited by pursuit of the means the law affords of asserting that right."

It necessarily follows, *a fortiori*, that a petition for removal which expressly recites that the petitioner appears specially cannot operate as a general appearance.<sup>30</sup> The same is true where there is a special appearance, in the state court, to plead to the jurisdiction over the person, followed by a petition for removal. In such case the plea to the jurisdiction can be entertained in the federal court after the removal.<sup>31</sup>

#### § 650. Special Appearance.

The special appearance is a limited appearance made solely for the purpose of enabling the defendant to question the jurisdiction of the court over the person. For instance, if the subpoena is invalid or the service irregular,<sup>32</sup> or if service is had on some agent whose authority to receive service the defendant wishes to question, he should put in a special appearance. If a party is served with process when he is privileged, as, for instance, when he is attending court as a suitor, the process will be set aside on special appearance and motion to that effect, accompanied by affidavit.<sup>33</sup>

A motion made on special appearance brings the party into court

*Hinds v. Keith* (1893) 6 C. C. A. 231, T. & S. F. R. Co. (1885) 24 Fed. 866; 57 Fed. 10; *Construction Co. v. Simon* (1891) 53 Fed. 6; *Caakey v. Chenoweth* (1894) 10 C. C. A. 605, 62 Fed. 712.

<sup>30</sup> *Goldey v. Morning News of New Haven* (1895) 15 Sup. Ct. 559, 156 U. S. 518, 39 L. ed. 517, *affirming* *Golden v. Morning News of New Haven* (1890) 42 Fed. 112; *Hawkins v. Peirce* (1897) 79 Fed. 452; *Kinne v. Lant* (1895) 68 Fed. 430; *Clews v. Woodstock Iron Co.* (1890) 44 Fed. 31.

<sup>31</sup> *Parrott v. Insurance Co.* (1890) 5 Fed. 391; *Blair v. Turtle* (1881) 5 Fed. 394-396; *Elgin Canning Co. v. Atchison*, 5 Biss. 64.

*Kauffman v. Kennedy* (1885) 25 Fed. 785; *Miner v. Markham* (1896) 28 Fed. 387; *Golden v. Morning News* (1890) 42 Fed. 112; *Reifsnider v. Publishing Co.* (1891) 46 Fed. 433; *Forrest v. Railroad Co.* (1891) 47 Fed. 1; *Morris v. Graham* (1892) 51 Fed. 53; *McGillivray v. Claffin* (1892) 52 Fed. 657.

<sup>32</sup> *Ex parte Shaw* (1892) 12 Sup. Ct. 935, 145 U. S. 444, 36 L. ed. 768, 772; *Harkness v. Hyde* (1878) 98 U. S. 476, 25 L. ed. 237.

<sup>33</sup> *Juneau Bank v. McSpedon* (1890) 5 Biss. 64.

for all purposes relating to the disposition of that motion whether on appeal or otherwise.<sup>24</sup>

A special appearance, like a general appearance, may be entered formally, that is, the defendant or his solicitor may appear at the clerk's office and authorize him to note the entry of a special appearance, or a written memorandum of the defendant's appearance may be filed with the clerk by the defendant or his solicitor. From this written appearance, the clerk will make a note of the appearance in his order book. Again, the defendant may refrain from entering a formal special appearance with the clerk, and may make his first appearance by motion, application, or plea, based on the special defect he desires to question.

#### § 651. Formal Special Appearance.

If the special appearance is formally entered at the clerk's office, pains must be taken to make the written evidence of such appearance show on its face that the appearance so entered is a special one. If the solicitor merely has his name entered as appearing for the defendant, this is a general appearance. A special formal appearance filed with the clerk should expressly show that it is a special appearance, and that it is made for a particular purpose therein indicated, and for no other purpose.<sup>25</sup>

#### § 652. Informal Special Appearance.

Considerable latitude, and even liberality of practice is indulged by the courts in those cases where no formal appearance has been made and the nature of the appearance, whether general or special, has to be gathered by implication from the contents and purport of the first motion or pleading of the defendant. Here the nature of the appearance must be, in a measure, determined from the act done or thing sought to be accomplished by that appearance. Thus, if an applicant comes into court for the sole avowed purpose of having the service set aside and what he does has no relation to anything else, it is not apparent, as the supreme court once observed in an analogous

<sup>24</sup> *Pike v. Gregory* (C. C. A.; 1899) 94 Fed. 373, 36 C. C. A. 299.

<sup>25</sup> *Ellsworth Trust Co. v. Parramore* (C. C. A.; 1901) 108 Fed. 906, 48 C. C. A. 132.

An appearance for the purpose of questioning the service is a special appearance, when the motion accompany-

ing the appearance contains a recital to the effect that the party "appears specially for the purpose herein set forth and for no other purpose." *American Cereal Co. v. Pettijohn Co.* (1895) 70 Fed. 276; *Fairbank v. Cincinnati, etc. R. Co.* (C. C. A.; 1892) 4 C. C. A. 403, 54 Fed. 420.

case, why he should be required to say in words, what his act already declares, that this is his sole purpose.<sup>36</sup> Wherever the fact clearly appears that the defendant limits his appearance for the purpose of raising a question that is only available upon special appearance, effect will be given to that intention; and the appearance will be considered a special appearance.<sup>37</sup>

### § 653. Local Rule Determining Mode of Special Appearance.

Where the rules of the court specify a particular mode by which alone the special appearance may be made, this method must be followed. The right to make a special appearance is not a substantial one inherently existing; it is a privilege allowed by practice, and it must be exercised under the rules of procedure.<sup>38</sup>

### § 654. English Practice in Regard to Special Appearance.

Originally, by the practice of the English court of chancery, a defendant was not permitted to put in a special appearance until he had obtained leave of court to that effect and had entered into an undertaking to submit to the jurisdiction of the court, in case the objection made by him to the service should not be sustained. The history and bearing of this rule are sufficiently exhibited in the first of the following cases. It is not in force in the federal courts, though a modification of it exists in the ninth circuit, as will appear from the second case.

*Romaine v. Union Ins. Co.* (1886) 28 Fed. 631: This case contains a learned exposition of the law pertaining to general and special appearances. Judge Hammond here shows that, under the English chancery practice, the defendant was not effectually brought into court by the service of the subpoena but only by his subsequent appearance. The appearance was general or special. The general appearance was commonly a rather unceremonious affair and consisted of a mere exchange of memoranda between the court clerks of the plaintiff and defendant, respectively, in the six clerks' office or, after the abolition of the six clerks' office, in the writ and record clerks' office. It served as the basis for subsequent compulsory process. If the general appearance was not thus voluntarily made and noted by the clerks, the proceedings were more formal, and the appearance was entered with the registrar.

If the defendant supposed the subpoena to be defective or wished to complain of some irregularity in the service, he would not put in a general or voluntary

<sup>36</sup> See *Wabash Western Ry. v. Brown* (1896) 164 U. S. 279, 41 L. ed. 434. *Romaine v. Union Ins. Co.* (1886) 28 Fed. 637, 638; *Peterson v. Morris* (1899)

<sup>37</sup> *York v. Texas* (1890) 137 U. S. 20, 98 Fed. 48.

<sup>38</sup> *Goldney v. Morning News* 34 L. ed. 604; *Mahr v. Union Pac. R. Co.* (1906) 140 Fed. 921.

appearance but waited for the attachment to issue when the court should proceed to enforce his appearance. When the attachment issued, he thereupon moved to discharge it, on the ground of the defect in the subpoena or service. However, before he was allowed to come in and contest the validity of the attachment, it was required that he should put in his appearance with the registrar and enter into an undertaking that the sergeant-at-arms should be sent against him in case he should be found in contempt. Such was the nature of the conditional appearance, otherwise commonly known as the special appearance.

To appear specially it thus became necessary, in English practice, that the party should first procure an order of court permitting him to do so upon entering into a conditional undertaking to submit to the court in case the service should be found good. Judge Hammond observes that the practice above described, being the correct practice in vogue in England prior to the adoption of our rules, was applicable to the federal courts, under rule 90, and should be followed in every case where a defendant wishes to appear specially. However, the federal courts have not insisted upon the existence of an antecedent order of court allowing the special appearance.

*Mahr v. Union Pac. R. Co.* (1905) 140 Fed. 921: Rule 22 of the rules adopted by the circuit judges of the ninth circuit provides that, in any case where leave to appear specially could be granted by the court, a special appearance may be made by stating in the motion or "paper" filed for that purpose that the appearance is special, which motion shall also state that, if the ground on which the special appearance is made shall not be sustained by the court, then the party will appear generally within the time allowed therefor by law or by order of the court or by stipulation of the parties. If this agreement is not inserted, the appearance is deemed a general appearance, though the motion be otherwise worded in such way as to show that a special appearance was intended.

### § 655. Leave of Court Unnecessary in Federal Courts.

Under the practice commonly followed in the federal courts, the defendant is always permitted to put in a special appearance without leave of the court first had and obtained. Nor is he required to enter into any previous agreement in regard to submitting to the jurisdiction in the event his contention is not upheld. But when the point which he questions has been ruled against him, he is held to be in court and subject to the jurisdiction of the court regardless of the absence of any undertaking on his part. After the special appearance has served its purpose, the court will no longer indulge the fiction that the defendant is only partially, or specially, in court. It then proceeds to assert jurisdiction over him the same as if he had appeared generally.<sup>30</sup>

<sup>30</sup> *National Furnace Co. v. Moline, etc. Works* (1884) 18 Fed. 863.

Application for leave to enter a special appearance will not be granted where the applicant wishes to raise other issues than the preliminary question of jurisdiction over the person. If he wishes to raise such questions he must do so after a general appearance. *National Furnace Co. v. Moline, etc. Works* (1884) 18 Fed. 863.

### § 656. Substitution of Special for General Appearance.

A general appearance can be withdrawn and a special appearance substituted in its place only by leave of the court. In passing on such an application the court of equity exercises a broad equitable discretion. The effect of the withdrawal of a general appearance may be said to depend somewhat on the circumstances of the particular case.<sup>40</sup>

A general appearance may be so amended by leave of the court as to make it a special appearance. In the case cited below,<sup>41</sup> the court permitted such an amendment upon a showing that since the general appearance was made the original bill had been so amended as to be no longer subject to demurrer for want of jurisdiction, as it had previously been.

A general appearance in the supreme court cannot be altered after the end of the term into a special appearance by the clerk of the court, though such alteration is made by him in order to make the entry conform to instructions received from the attorney at the time the record was filed.<sup>42</sup>

### § 657. Ratification of Unauthorized General Appearance.

If an attorney who has been retained only to put in a special appearance puts in a general appearance, such appearance could be withdrawn or set aside; but if the party interested, after learning that a general appearance has been put in, acquiesces while other steps are being taken in the suit, he thereby ratifies the general appearance.<sup>43</sup>

### *Effect of General Appearance.*

### § 658. Jurisdiction over Subject-Matter and Jurisdiction over Person.

As is indicated above, the importance of the distinction between general and special appearances is chiefly manifest in taking advantage of objections to the jurisdiction of the court. Now there are two

<sup>40</sup> In *Jenkins v. York Cliffs Imp. Co.* Having received actual notice of the (1901) 110 Fed. 807, it was held that the withdrawal of a general appearance by leave of the court remitted the case to its original state so far as to let in a special motion to dismiss on the ground that the defendant was sued in the wrong district but not so far as to enable the defendant to insist on the fact that the service was insufficient.

<sup>41</sup> *Hohorst v. Hamburg-Amer. Packet Co.* (1889) 38 Fed. 273.

<sup>42</sup> *United States v. Armejo* (1896) 131 U. S. 133, Appx., 18 L. ed. 247.

<sup>43</sup> *Raymondville Paper Co. v. St. Gabriel Lumber Co.* (1905) 140 Fed. 265.

kinds of objections to the jurisdiction of a court; the one is to its jurisdiction over the subject-matter, the other to its jurisdiction over the person. The second may be waived, the first cannot be. It is only with reference to the second class of objections, namely, to the jurisdiction over the person, that there is any necessity for care on the part of the defendant in especially limiting the character of his appearance. If a defendant defends on the merits or pleads to the jurisdiction of the court over the subject-matter, without making any objection to its jurisdiction over his person, he concedes the jurisdiction over his person. The rule, in other words, is this: Where a defendant comes into court for any purpose, if he intends to object to the court's jurisdiction over his person, he must first make that objection, and limit his appearance accordingly. If he appears for any other purpose, without making this objection, he has waived it.<sup>44</sup> The distinction between want of essential jurisdiction in the court and a want of jurisdiction over the person is important. The two questions are often confused. An exemption from service, or any mere defect or irregularity of service, may be waived and is waived by a general appearance or by answering to the merits. The want of essential jurisdiction is never waived nor is it waivable by any act of either party.<sup>45</sup>

### § 659. Defects Waived by General Appearance.

The putting in of a formal general appearance or the putting in of any pleading which operates as a general appearance waives all objection to defects in the subpoena and to the regularity of the service and all objection to the jurisdiction of the court over the person of the defendant, as, for instance, the objection incident to the fact that he has been sued in a district where he is not subject to suit.<sup>46</sup> By

<sup>44</sup> *Wabash Western Ry. Co. v. Brown* (1888) 12 Pet. 300, 9 L. ed. (1896) 13 C. C. A. 222, 65 Fed. 941, 1093; *Farrar v. United States* (1890) 3 Pet. 459, 7 L. ed. 741; *Pollard v.*

<sup>45</sup> *Harkness v. Hyde* (1878) 98 U. S. 476, 479, 25 L. ed. 237, 238; *Romaine v.* 666; *Shields v. Thomas* (1855) 18 How. 253, 15 L. ed. 368; *Caskey v. Chenoweth* (1891) 45 Fed. (C. C. A.; 1894) 62 Fed. 712, 10 C. C. 23; *Whittle v. Artis* (1893) 55 Fed. A. 605; *Mehlin v. Ioe* (C. C. A.; 1893) 919; *Decker v. New York Belting & Packing Co.* (1873) Fed. Cas. No. 3,727; *Co. v. Todd* (C. C. A.; 1893) 56 Fed. 104, 5 C. C. A. 432; *Whitecomb v. Hooper* (C. C. A.; 1897) 81 Fed. 946, 27 C. C. 2,279.

<sup>46</sup> *Fitzgerald, etc. Const. Co. v. Fitzgerald* (1890) 137 U. S. 98, 34 L. ed. 608; *Taylor v. Longworth* (1840) 14 Pet. 172, 10 L. ed. 405; *Toland v.* A. 19; *Texas, etc. R. Co. v. Saunders* (1894) 14 Sup. Ct. 257, 151 U. S. 105, 38 L. ed. 90; *Texas etc. R. Co. v. Cox* (1892) 12 Sup. Ct. 905, 145 U. S.

a general appearance the defendant admits service and the regularity thereof, and submits himself to the jurisdiction of the court.<sup>47</sup>

A general appearance, in person or by counsel, waives want of process and service, or, as is otherwise said, is equivalent to service. It gives the court jurisdiction over the person so far as the court can acquire and exercise it.<sup>48</sup> No question of process, service, or jurisdiction over the person, can be raised where the defendant has appeared and pleaded.<sup>49</sup> The federal courts, and especially the supreme court, are very exacting in the enforcement of this principle;<sup>50</sup> and it has been applied in a great number of cases involving a variety of conditions.

It has been held that, after the defendant has put in a general appearance, he cannot have the benefit of an objection based on the fact that he was exempt from service in that cause, such service having been made on him while he was in attendance as a witness in another cause;<sup>51</sup> or the benefit of an objection that service was obtained on him by a ruse whereby he was induced to come within the jurisdiction on a false representation.<sup>52</sup> Service of process in a district where the defendant is not subject to service of process is waived by answering to the merits.<sup>53</sup> One who is added as a party defendant by an order of the court cannot, on appeal, object to the propriety or

503, 36 L. ed. 329; *Charlotte First Nat. Bank v. Morgan* (1889) 132 U. S. 141, 10 Sup. Ct. 37, 33 L. ed. 282; *Page v. Chillicothe* (1881) 6 Fed. 599; *Hatch v. Ferguson* (1893) 57 Fed. 906, *affirmed* (1895) 68 Fed. 43, 15 C. C. A. 201, 33 L.R.A. 769; *Hale v. Continental Life Ins. Co.* (1882) 12 Fed. 359; *Betzoldt v. American Ins. Co.* (1891) 47 Fed. 705; *Norris v. Atlas Steamship Co.* (1889) 37 Fed. 279; *Bowdoin College v. Merritt* (1893) 59 Fed. 6; *Fife v. Bohlen* (1885) 22 Fed. 878; *Briggs v. Stroud* (1893) 58 Fed. 717; *Noonan v. Delaware, etc. R. Co.* (1895) 66 Fed. 1; *Fosha v. Western Union Tel. Co.* (1902) 114 Fed. 701; *Foots v. Massachusetts Ben. Ass'n* (1889) 39 Fed. 23, *criticizing* *Reinstadler v. Reeves* (1887) 33 Fed. 308, *contra*; *Kerp v. Michigan L. S. R. Co.* (1873) Fed. Cas. No. 7,727; *McCloskey v. Cobb* (1896) Fed. Cas. No. 8,702; *Kelsey v. Pennsylvania R. Co.* (1877) Fed. Cas. No. 7,879.

*Compare* *Crown Cotton Mills v. Turner* (1897) 82 Fed. 337; *Person v. Standard, etc. Co.* (1899) 92 Fed. 1022, 35 C. C. A. 679, *reversing* *Person v. Fidelity, etc. Co.* (1897) 84 Fed. 759.

<sup>47</sup> *Gracie v. Palmer* (1823) 8 Wheat. 699, 5 L. ed. 719; *Walker v. Robbins* (1852) 14 How. 584, 14 L. ed. 552.

<sup>48</sup> *Henderson v. Carbondale, etc. Co.* (1891) 140 U. S. 25, 35 L. ed. 332, 11 Sup. Ct. 691; *Habich v. Folger* (1874) 20 Wall. 1, 22 L. ed. 307; *Creighton v. Kerr* (1874) 20 Wall. 8, 22 L. ed. 309; *Commercial, etc. Bank v. Slocomb* (1840) 14 Pet. 60, 10 L. ed. 354; *Hill v. Mendenhall* (1875) 21 Wall. 453, 22 L. ed. 616; *Knox v. Summers* (1806) 3 Cranch 496; 2 L. ed. 510.

<sup>49</sup> *Rhode Island v. Massachusetts* (1838) 12 Pet. 657, 9 L. ed. 1233.

<sup>50</sup> *Romaine v. Union Ins. Co.* (1886) 28 Fed. 638.

<sup>51</sup> *Goodyear v. Chaffee* (1855) Fed. Cas. No. 5,564; *Segee v. Thomas* (1853) Fed. Cas. No. 12,633.

<sup>52</sup> *Fitzgerald, etc. Co. v. Fitzgerald* (1890) 137 U. S. 98, 11 Sup. Ct. 36, 34 L. ed. 608.

<sup>53</sup> *Logan v. Patrick* (1809) 5 Cranch 288, 3 L. ed. 103; *Iowa, etc. Co. v. Bliss* (1906) 144 Fed. 446.



validity of the order, after having voluntarily come in and defended on the merits.<sup>54</sup> One who enters a general appearance and answers to the merits expressly disclaiming any objection to the jurisdiction cannot later raise the question of adequate remedy at law, where the claim sued on is such as to be within the general competency of the court of equity.<sup>55</sup>

A mistake in a subpoena in regard to the description of the capacity in which the defendant, a personal representative, is sued is cured by his coming in and defending on the merits, there being a proper description of him in the bill itself.<sup>56</sup> Nor, after a general appearance, can he then raise the objection that he is not named as a defendant in the prayer for subpoena.<sup>57</sup>

#### § 660. Appearance Limited to Pending Suit.

Though a general appearance is said to be an appearance for all purposes, its scope is limited to the scope of the suit in which the appearance is put in. By a general appearance the court does not obtain such jurisdiction of the party as to be justified in allowing an amendment entirely changing the cause of action.<sup>58</sup>

An appearance cannot be considered a general appearance such as will waive a defect in prior service, where the appearance is not put in until after the decree is rendered, and is then made solely for the purpose of striking the cause from the docket.<sup>59</sup>

#### § 661. Effect of General Appearance after Special Appearance.

After a party has made a special appearance and unsuccessfully contended that the court had not obtained jurisdiction over him, a subsequent general appearance and the making of a defense on the merits do not operate as a waiver of the preliminary question.<sup>60</sup> The purpose of a special appearance is to prevent a waiver of any objection that would be cured by the general appearance. When such

<sup>54</sup> *Henderson v. Carbondale Coal & Coke Co.* (1891) 140 U. S. 24, 11 Sup. Ct. 601, 35 L. ed. 339.

<sup>55</sup> *Levi v. Evans* (C. C. A.; 1893) 67 Fed. 677, 6 C. C. A. 500.

<sup>56</sup> *Johnson v. Waters* (1894) 4 Sup. Ct. 619, 111 U. S. 640, 28 L. ed. 547.

<sup>57</sup> *Burk v. Imhauser* (1891) 3 Fed. 457.

<sup>58</sup> *Western Wheeled Scraper Co. v. Gabagan* (1907) 152 Fed. 648.

<sup>59</sup> *Door v. Gibboney* (1878) 3 Hughes, 382; *First Nat. Bank v. Cunningham*

(1891) 48 Fed. 510. See, however, *Crane v. Penny* (1890) 2 Fed. 187.

<sup>60</sup> *Mexican Cent. R. Co. v. Pinkney* (1893) 149 U. S. 194, 13 Sup. Ct. 859, 37 L. ed. 699; *Galveston, etc. Co. v. Gonzales* (1894) 151 U. S. 496, 14 Sup. Ct. 401, 38 L. ed. 248.

But see *Eddy v. Lafayette* (C. C. A.; 1892) 1 C. C. A. 441, 49 Fed. 867, 809. Compare *Baltimore, etc. Co. v. Freeman* (C. C. A.; 1903) 112 Fed. 237, 59 C. C. A. 211.

an appearance has been entered, and the objections have been overruled, the general appearance afterwards does not waive it; and the party objecting may have the benefit of the objection in the higher court.<sup>61</sup>

### § 662. Preliminary Motion on Special Appearance.

All preliminary objections that are waived by general appearance must, if the defendant is to have any benefit from them, be made upon special appearance. Thus if a defendant wishes to make objection for defect of process or service, or in any way to question the jurisdiction of the court over his person, he should make a special appearance and then move to dismiss the service, quash the subpoena, abate the process, or dismiss the suit.

The federal courts seem to have given but little attention to the exact form of motion by which such defects and objections can be made available. The courts have, indeed, been very liberal and have shown a commendable disposition to accede to any feasible mode of proceeding that the party interested may have adopted. In the cases noted below<sup>62</sup> the objection for irregularity was taken by motion to set aside the return, quash the subpoena, dismiss the bill, or dismiss the service.

Upon the whole, the cases show that "technical practice has been quite generally discarded" and no particular mode of procedure is insisted upon.<sup>63</sup>

### *Compulsory Appearance.*

### § 663. Process for Enforcing Compulsory Appearance.

If a defendant who has been regularly served with a subpoena refuses, or fails, to put in an appearance, either one of two lines of procedure may be adopted. The plaintiff may either take steps to enforce the defendant's appearance by compulsory process or he may

<sup>61</sup> *Insurance Co. of North America v. v. St. Louis, etc. Co.* (1881) 7 Fed. 139; *Svendsen* (1896) 74 Fed. 346, 347; *Harkness v. Hyde* (1878) 98 U. S. 472, 25 L. ed. 238; *Plimpton v. Winslow* (1881) 9 Fed. 365; *Pruvost v. Pidgeon* (1881) 9 Fed. 400; *Forayth v. Pierson* (1882) 9 Fed. 801;

<sup>62</sup> *U. S. v. Union Pac. R. Co.* (1878) 98 U. S. 569, 579, 25 L. ed. 143; *Kentucky Silver Min. Co. v. Day* (1873) 2 Sawyer 466; *Johbins v. Montague* (1871) 5 Ben. 422, 6 M. B. R. 508; *Hyslop v. Hoppock* (1872) 5 Ben. 447; *Pacific R. R. v. Missouri Pac. R. Co.* (1880) 1 McCrary 647, 3 Fed. 772; *Massachusetts, etc. Co. v. Chicago, etc. Co.* (1882) 13 Fed. 287; *Castello v. Castello* (1882) 14 Fed. 207; *Bowen v. Christian* (1883) 16 Fed. 720; *United States v. American Bell Telephone Co.* (1886) 29 Fed. 17, 28.

<sup>63</sup> *Romaine v. Union Ins. Co.* (1886) 28 Fed. 638.

proceed to have an order entered taking the bill *pro confesso*. The practice of taking a bill *pro confesso* against a defendant who fails to appear and answer is comparatively modern, and the introduction of this practice has furnished a convenient and effective means of forcing reluctant defendants to take such steps as may be incumbent on them to enable the suit to proceed in an orderly and proper way. As a consequence, the method of proceeding by *pro confesso* has almost entirely superseded the practice of resorting to compulsory process. In fact compulsory process is not necessary or desirable in any case save only where the bill calls for a discovery, and the plaintiff wishes to compel the defendant to give that discovery. Such instances are rare in our practice; but as they may sometimes occur, it is proper briefly to note the method of procedure. *Pro confesso* proceedings will be the subject of a subsequent chapter. We may add that the proceedings described in the present chapter, while not now of any great importance in the particular connection—as the *pro confesso* supplies a better means of taking advantage of a failure to appear or answer—are nevertheless important as furnishing the basis for proceedings in other ordinary contempts. The writs of attachment and sequestration, here described, are the proper means of process in the federal courts for the purpose of compelling obedience to any interlocutory order or decree;<sup>64</sup> and in whatever connection they are used, the procedure is the same.

#### § 664. Contempt of Defendant in Refusing to Appear.

By refusing to appear in obedience to a subpoena, a defendant puts himself in contempt of court. The same is true where, having appeared, the defendant refuses to answer the bill or to obey any proper order the court may make. A person who is in contempt is liable to be punished, and the first step to be taken against him is naturally one by which the court may assert its physical power over him. To this end a writ of attachment is issued against the person of the defendant. This is the ordinary process that issues out of all courts of record in cases of contempt, and it is awarded by judges, at their discretion, on a bare suggestion or on their own knowledge.

#### § 665. Attachment of Person.

The writ is issued by the clerk under the seal of the court and is directed to the marshal of the district. It commands the officer to

<sup>64</sup> Equity Rule 7.

attach the party and bring him before the court to answer as well touching the contempt as also concerning such other matters as may be laid to his charge; and further that the party may be required to perform and abide such order as the court may make in the premises.<sup>65</sup>

The return day of the writ should be specified in it or indorsed upon it. This day will usually be a day in term time or one of the rule days of the court, but the judge of the court may without doubt, under the liberal practice allowed by the equity rules, direct the writ to be returned on any day.<sup>66</sup> The order may be made returnable immediately, but this is seldom necessary or desirable save in matters coming before the court in term time and requiring prompt proceedings.

#### § 666. Execution and Return of Writ.

The officer to whom the writ is directed should use diligence to procure the attachment to be executed, and he has until the return day to make his return. If the writ is returnable immediately, he has a reasonable time within which to execute it and make his return. By the practice of the English chancery he was, in such case, allowed four days, and on the fifth the plaintiff could call for the return of the writ.<sup>67</sup>

#### § 667. Intermediate Process.

If the officer returns the attachment *non est inventus*, the plaintiff may procure *alias* and *pluries* writs of attachment, as he is advised, until he succeeds in taking the defendant or finds that such process is ineffectual. If the process of attachment wholly fails, the plaintiff must resort to the writ of sequestration. In the practice of the English chancery, there was a rather elaborate series of proceedings, following the return of *non est inventus*, consisting, first, of an attachment with proclamations; second, of a commission of rebellion; third, of a warrant of arrest addressed to the sergeant-at-arms of the court; fourth, of the writ of sequestration.<sup>68</sup>

<sup>65</sup> 1 Dan. Ch. Pr. 574.

According to the practice of the English chancery, an affidavit of the service of the subpoena always had to be filed before the attachment would be issued. This affidavit has to state the time, place, and manner of service, with particularity. 1 Smith Ch. Pr. (2d ed.) 136; 1 Dan. Ch. Pr. 579.

<sup>66</sup> Equity Rules 1, 3.

<sup>67</sup> 1 Smith Ch. Pr. (2d ed.) 139.

<sup>68</sup> 1 Dan. Ch. Pr. 605-651. By rule 6 of English Orders in Chancery (1841), the necessity for these intermediate steps was done away with. The rule is to the following effect: "No writ of attachment with proclamations nor any writ of rebellion shall be hereafter

In the federal courts the intermediate steps in this series of proceedings may be dispensed with, and the plaintiff is permitted to resort at once to the writ of sequestration as soon as the attachment has been returned not found. This follows from equity rule 7, which provides, in substance, that unless otherwise specially ordered by the circuit court, a writ of sequestration shall be the proper *meane process* to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court, when a writ of attachment has been issued and the defendant cannot be found. The writ of subpoena is apparently an interlocutory order of the court within the meaning of this rule. Even if it were assumed that this rule is not strictly applicable to cases where an attachment is issued to enforce an appearance, it still appears that the intermediate steps between the attachment and sequestration, indicated above, are not conformable to the organization and usages of our courts, and consequently they must, in any event, be considered obsolete.

#### § 668. Sequestration Proceedings.

The proceedings incident to a sequestration in equity are similar in many respects to receivership proceedings; and it may indeed be considered that the sequestrators are only a special kind of receivers. The law concerning sequestration also has some analogy to the law governing distress at common law, for the property taken in sequestration proceedings is treated as being a mere pledge for the doing of an act, and the sequestrators apparently acquire no property in it.

#### § 669. Writ of Sequestration.

Process of sequestration consists of a writ or commission directed to discreet and disinterested persons, usually four in number, called the sequestrators. The writ orders and empowers them to enter on and sequester the real and personal estate and effects of the defendant, or some particular part or parcel of it, and to take, receive, and sequester the rents, issues, and profits, and keep the same in their hands, or to pay it out or otherwise dispose of it in such manner and to such persons as the court shall, in its discretion, appoint.<sup>69</sup>

issued for the purpose of compelling obedience to any process, order, or decree of the court."

<sup>69</sup> 1 Dan. Ch. Pr. 628.

## § 670. Sequestrators.

The sequestrators are officers of the court and as such are amenable to its authority. They are bound to act in the execution of their office as they are from time to time ordered by the court. They must account for what comes to their hands, and bring the money into court or put it out at interest as shall be found necessary. Money turned into court by the sequestrators is not usually paid to the plaintiff but is held in court till the defendant has appeared, answered, or otherwise cleared his contempt. When the defendant's contempt is cleared, the property sequestered is accounted for and the balance is turned over to the defendant.

In regard to the disposition of the property and funds taken in sequestration proceedings there appears to be a difference between a sequestration upon mesne process, as to enforce an appearance or answer, and a sequestration to enforce an order for the payment of money or delivery of property. In the latter case, the property or money sequestered may be applied to the satisfaction of the claim; in the other, the court will not ordinarily apply the property or money to the plaintiff's demand, though authority is not wanting to the effect that, when the court has once gotten the property of the defendant in its clutches by sequestration, it has the power to hold the same to enforce whatever debt may be eventually found due.<sup>70</sup>

## § 671. What Property May Be Sequestered.

The sequestrators may take possession of the defendant's goods and chattels, but they have no right to enforce rights of action vested in him. They are also authorized to enter upon his lands and tenements and to collect the rents and profits. The defendant should be effectually excluded from the possession of the property sequestered; but as the property is considered as being in the nature of a mere pledge to answer the contempt, the sequestrators seemingly have no authority, in the absence of an order of court to the contrary, to remove the property, being personalty, from the premises where it is found. Furthermore, the sequestrators have no power to sell any of the goods, and if they are perishable or otherwise of such nature as to make a sale desirable, application must be made to the court for an order to this effect.<sup>71</sup>

<sup>70</sup> 1 Dan. Ch. Pr. 635.

<sup>71</sup> 1 Dan. Ch. Pr. 638.

makes a return of *cepi corpus* in which he states that he has attached the defendant as he was by the writ commanded to do. When a defendant is thus taken in attachment he must, unless admitted to bail, be held in custody by the marshal to await the day set for him to be taken into court. If the marshal allows him meanwhile to go at large, it will be at the officer's risk; for, after once taking him, it is the duty of the marshal to have him forthcoming at the proper time.<sup>75</sup>

#### § 676. Production of Defendant in Court.

On the day set for the return, the defendant is carried before the court to abide its orders. If he is in contempt for failing to appear or answer he will be ordered to put in his appearance or to answer, as the case may be, and will be fined for his contumacy. If he still remains obdurate, the court will remand him to jail until he purges himself of the contempt.<sup>76</sup>

If the defendant is admitted to bail and fails to appear at the return day, as he is bound to do by the obligation of the bond, he can be attached again; and the bond is, of course, forfeited.<sup>77</sup>

<sup>75</sup> 1 Dan. Ch. Pr. 586.

<sup>76</sup> The proceedings in the English chancery in case a defendant was lodged in jail by the sheriff used to be rather complicated, involving as they did the issuance of a writ of habeas corpus and

the service of a messenger to bring the party before the court. 1 Dan. Ch. Pr. 592-604. These proceedings are not adaptable to our practice, being cumbersome and unnecessary.

<sup>77</sup> 1 Dan. Ch. Pr. 587.

## CHAPTER XVI.

### THE ANSWER.

#### *Formal Defense by Answer, Plea, or Demurrer.*

- § 677. Formal Pleading of Defendant.
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*Formal Defense by Answer, Plea, or Demurrer.*

**§ 677. Formal Pleading of Defendant.**

If the plaintiff's bill appears not to be subject to dismissal upon preliminary motion, it becomes necessary for the defendant, if he desires to contest the suit, to submit his defense by means of some formal pleading. Every adjudication of rights contested on the merits in a court of equity must be based on pleadings. The plaintiff's pleading consists of his bill. The defendant's pleading may take the form of an answer, plea, or demurrer; and at different stages or in different aspects of his defense he may resort to any two of them or to all.

**§ 678. Time to Plead, Answer, or Demur.**

The time within which it is necessary for a defendant to answer, plead, or demur, is determined by reference to the rule day on which his appearance is entered. He must answer, plead, or demur on or before the rule day next succeeding that rule day.<sup>1</sup> This applies where a formal appearance is entered punctually on the right rule day. The equity rule does not specify the time to be allowed when no formal appearance is put in at all, or when an appearance is in fact put in but on a day sooner or later than the very rule day on which the appearance should be, or is, entered.

Where no formal appearance is entered, the defendant's time to answer, plead, or demur, is obviously abridged. In such case it is necessary for him to file his pleading within the time limited for his appearance, for otherwise a *pro confesso* will be taken for the failure to appear, and the right to plead, answer, or demur will thereby be taken away.<sup>2</sup>

If the defendant puts in a formal appearance but on some other day than the rule day on which he is required to appear, the question as to the time within which he should answer, plead, or demur, is not so easy to answer. It is reasonable to say that if a defendant delays to enter an appearance until after the rule day on which he is required to appear and, no *pro confesso* having been taken, enters his appearance on a later day, then he should be required to answer, plead, or demur, by the next ensuing rule day whether that day is many days off or only one day off; for if he had entered his appearance on the right day he would have had the whole interval between the two rule days, and as his failure to appear promptly is his own fault, he cannot take advantage of it to enlarge his time.

If a defendant enters a formal appearance on some day prior to the rule day on which he is required to appear, it cannot be supposed that he would be in default for failure to answer, plead, or demur, until the rule day next succeeding that on which he would be required to appear.<sup>3</sup> Equity rule 18 contemplates that a defendant shall have the full interval between two rule days within which to answer, plead, or demur, after he has appeared, and it would be unreasonable to hold that he must have less when he is more prompt than the law requires.

Where the rule day on which a party is required to answer, plead,

<sup>1</sup> Equity Rule 18.

<sup>2</sup> Equity Rule 12.

<sup>3</sup> The vague suggestion to the con-

trary in *Heyman v. Uhlman* (1888) 34 Fed. 686, cannot be accepted as sound.

or demur, happens to be a legal holiday, the next day available at those rules is the day on which the pleading must be filed.<sup>4</sup>

#### § 679. Pleading before Time Expires.

Always, in considering the matter of time allowances under the rules, it is to be borne in mind that these rules are made to prevent unreasonable delays, and while they fix limits within which particular steps should be taken, they do not prevent a party in whose favor a particular allowance is made from taking the step in question sooner, if he sees fit to do so. It is entirely regular for a defendant to expedite the cause by appearing or answering before the rule day on which he is required to appear or answer; and when he does so, the other party cannot object. Nor can the plaintiff himself, who has voluntarily expedited the cause by appearing or answering sooner than he was required, afterwards contend that as to other subsequent steps he is to have the same indulgence as if the proceedings had not been expedited but had taken the usual course.<sup>5</sup>

#### § 680. Failure to Plead in Time Limited.

Another thing to be remembered is that a failure of the defendant to answer, plead, or demur, within the time fixed by the rules, merely puts the plaintiff in a position to take advantage of the default by procuring a *pro confesso* to be entered; and if the plaintiff does nothing, the defendant may come in at any time thereafter and answer, plead, or demur.<sup>6</sup>

#### § 681. Motion to Extend Time for Defendant to Plead.

An enlargement of time within which to answer, plead, or demur, will always be granted upon motion for that purpose and good cause shown.<sup>7</sup>

*Poultney v. City of La Fayette* (1838) 12 Pet. 472, 9 L. ed. 1161: In the exercise of its discretion, the circuit court below had given the defendants additional time within which to answer, the case being one where many defendants were involved and the service on some of them was recent. In upholding the granting

<sup>4</sup> *Harvey v. Richmond, etc. R. Co.* answer is such as could have been set (1894) 64 Fed. 19. up by plea, as for instance the defense

<sup>5</sup> *Heyman v. Uhlman* (1888) 34 Fed. of the statute of limitations, does not 686. alter the case. *Hayman v. Keally*

<sup>6</sup> An answer may be filed at any time (1828) 3 Cranch C. C. 325, Fed. Cas. before the bill is taken for confessed. No. 6,265.

The fact that the defense made in the <sup>7</sup> Equity Rule 18.

of this indulgence, the supreme court said: "Every court of equity possesses the power to mould its rules in relation to the time and manner of appearing and answering, so as to prevent the rule from working injustice; and it is not only in the power of the court, but it is its duty, to exercise a sound discretion upon this subject, and to enlarge the time, whenever it shall appear that the purposes of justice require it. The rules prescribed by this court do not and were not intended to deprive the courts of the United States of this well-known and necessary power."

A motion to enlarge time can be made to any judge of the court in vacation or in term and either at chambers or on a rule day at the clerk's office. Unless some other day is assigned by the judge for the hearing, the motion will be heard on a rule day. Reasonable notice of the motion should be given to the adverse party or his solicitor.\*

*General Principles Pertaining to Answer.*

**§ 682. Answer to Bill for Discovery and Relief.**

In considering the different pleadings by which a defendant may make an effective defense, we shall begin with the answer, not only because this is the most important and the most frequently used of all forms of defensive pleadings, but because a knowledge of this subject contributes much to a good understanding of the subject of pleas and demurrers. This line of procedure also appears to be the one that will lead to the least repetition. Accordingly, we now assume that the defendant, being in court and desirous of contesting the suit, does not avail himself of a plea or demurrer but decides to answer the bill. Moreover, we shall assume, in the main discussion, that the bill to be answered is the typical bill of equity pleading, the bill of discovery and relief. In modern times the discovery feature of the bill has become less important in practice than it used to be, but equity pleading has been so deeply influenced by the theory and principle of discovery that no intelligent presentation of the subject of answers can be made without constant reference to discovery. It would seem that when the bill waives the defendant's oath as it now almost always does, the principle of discovery is gone completely out of the case, and that such a bill thereupon of necessity becomes in theory and in fact a bill for relief solely. We shall have occasion to consider the extent to which this may be true. The fact here to be observed is that even in such suits the courts cling tenaciously to the conceptions and to the practice developed in former times.

\* Equity Rule 3.

### § 683. Written Answer.

The answer is the defendant's written response to the allegations and charges of the bill. From the early records of the chancery court in England it appears that for a long time the defendant's answer was not recorded in writing. He personally appeared in court in response to the writ of subpoena, or was brought up in custody, and was examined orally by the chancellor. Upon such examination of the defendant, supplemented, if need be, by the similar examination of witnesses, the chancellor made his order or decree. Possibly the plaintiff was examined in some cases. The earliest hints we get of the nature of the defenses made by defendants in their answer are obtained from recitals in the early decrees, the substance of the defendant's plea having been sometimes prefixed to the judgment.<sup>9</sup> In the fifteenth century written answers came to be filed. This practice no doubt arose from the necessity of taking answers in writing in those cases where the defendant, on account of remoteness, illness, or other reason, was unable to appear in court in person.

### § 684. Taking of Answer.

Nowadays we speak of a defendant as appearing in response to the subpoena and putting in his answer. According to the original practice of the court of chancery, or at least according to the practice in vogue from the time settled rules prevailed, it would be more accurate to speak of the answer as being taken. If the defendant lived in London he was examined on the bill and interrogatories, and his answer was taken by one of the masters of the court. Later the master left the matter of the examination of the defendant to his counsel and permitted him to draw up the answer, just as the court had delegated to the plaintiff's counsel the duty of passing primarily on the legal sufficiency of the bill before filing it.<sup>10</sup> However, though the professional and clerical duty of drawing up the answer was thus confided to the defendant's counsel, the answer remained in theory, as before it had been in fact, a pleading taken before the master or clerk of the court.

<sup>9</sup> Baildon, *Select Cases in Chan.* xvii. are authorized them to take the depositions of witnesses as well as the answer of the defendant. The earliest depositions known come from about the year 1458. Baildon, *Select Cases in Chan.* xxviii.  
<sup>10</sup> 2 Dan. Ch. Pr. 230.

In country causes, that is, in causes where the defendant did not live in or near London, the duty of examining the defendant and taking his answer was delegated to a commissioner, or commissioners, in the country. For this purpose a copy of the bill and interrogatories was sent to the commissioner, and he proceeded to take the answer just as the master would have taken it if the defendant had appeared before the master.<sup>11</sup> In process of time it became permissible for the counsel or solicitor of the defendant to draw up the answer of his client in country causes as well as in town causes, the defendant merely appearing before the commissioner to swear to his answer and deliver it to that officer to be forwarded to the court of chancery. It was, however, still true that the answer in a country cause was in theory, as before it had been in fact, taken by the commissioner.

#### § 685. Commission to Take Answer in Federal Court.

In the federal courts the practice of taking the answer before commissioners, such as prevailed in England in case of defendants living in the country, is not generally followed; but the power of the court to appoint commissioners to take an answer is undoubted, and when this step is necessary to enable the court to get an answer from a particular defendant or when it is necessary to the ends of justice, the court will not hesitate to proceed in that way.

*Wilkins v. Jordan* (1813) 3 Wash. C. C. 226, Fed. Cas. No. 17,065: To a bill for an injunction against a decree the defendant filed an answer showing that whatever rights he originally had under the decree had been assigned by him to a third person, not a party to the suit. This person, being really the one in interest, made affidavit alleging that this answer was not full and satisfactory, and asked that a full answer might be taken under a commission. The application was allowed, though the plaintiff had not been given notice. Said the court: "This motion is not objectionable on account of its novelty, as we know that in England, answers taken in the country are always under a *dedimus potestatem* to commissioners. The practice in this country, so far as we are acquainted with it, is otherwise. . . . But when the defendant is merely nominal, and has not the means and probably might not have the inclination to give as full an answer as the case admits of, and the interest of the party really interested demands, we should think it entirely proper."

Where a defendant resides beyond the sea, the proper practice is for the court to issue a *dedimus potestatem* to a commissioner, or commissioners, there to take his answer. The *dedimus* should inform

<sup>11</sup> 2 Dan. Ch. Pr. 238.

the commissioner whether the answer should be taken under oath. In a case where the commission went to China, the commissioner was instructed to administer the oath in the most solemn form observed by the laws and usages of that country.<sup>12</sup>

**§ 686. Compulsory Process to Enforce Answer—Return of Attachment.**

If a defendant on whom service has been obtained refuses to answer the bill, and an answer appears to be needed for purposes of discovery, the plaintiff may resort to process of attachment. The practice in regard to this process is the same when it is used upon default of answer as when used upon default of appearance; and the steps to be taken have already been described.<sup>13</sup> It has been held that an attachment for not answering a bill after service of subpoena must be made returnable before the court; and if it is made returnable before the clerk himself at the rules, it will be quashed. A general attachment granted by the court is returnable immediately into the court.<sup>14</sup>

**§ 687. Who Must Answer to Bill.**

The person who is required to answer a bill is the defendant himself. The answer of the solicitor of the defendant will not be accepted as the answer of the defendant. The solicitor of the defendant may prepare an answer for his client and may put in the answer as his client's answer, but if he puts it in as his own answer, it will be stricken from the files. And a court will not give leave to file such an answer.<sup>15</sup>

An answer on the part of a nominal defendant against whom no charges are made in the bill, is superfluous; and such a person is not required to answer at all. The plaintiff could not in any event get a decree against him, and the bill must be dismissed as to him, at the hearing, if not before, answer or no answer.<sup>16</sup>

**§ 688. Answer of Corporation Defendant.**

The answer of a corporation should ordinarily be made by its principal officer, who should be able to admit or deny the facts charged

<sup>12</sup> *Read v. Consequa* (1822) 4 Wash. C. C. 335, Fed. Cas. No. 11,607.

<sup>13</sup> See *ante*, §§ 663-676.

<sup>14</sup> *Dowson v. Packard* (1826) 3 Cranch C. C. 66, Fed. Cas. No. 4,049.

<sup>15</sup> *Read v. Consequa* (1821) 4 Wash. C. C. 174, Fed. Cas. No. 11,606.

<sup>16</sup> *Andrews v. Solomon* (1816) Pet. C.

and interrogated about or to state want of knowledge clearly and truly as a reason for not admitting or denying such facts.<sup>17</sup>

An answer put in on behalf of a corporation by individual stockholders in its name cannot be regarded as its corporate answer. Accordingly, where such an answer is filed, the plaintiff is entitled to a *pro confesso*. But inasmuch as the officers and directors of a corporation may conceivably refuse to do their duty in defending for the company, a court, in order to protect the shareholders from any fraudulent conduct of the officers in this respect, will, upon proper showing, permit a stockholder to come in and defend for the purpose of protecting his own interests from unfounded claims against the company. When acting in this capacity, the stockholder appears for himself and others in like interest who may desire to join in the defense. This defense is technically independent of the defense of the company, but in effect the same purpose is subserved as if the company had properly defended in its own behalf. This procedure is somewhat analogous to that by which the stockholder is permitted as plaintiff to maintain an action in the company's name and right, upon the directors' refusal to sue.<sup>18</sup>

#### § 689. Joint and Several Answer.

The answer of several co-defendants may be put in by them jointly, provided they all swear to it. Upon principle such an answer is the several answer of each of them, although it is not so stated in the answer; and each could be separately indicted for perjury if the answer should prove to be false. The common practice, however, is for the answer to recite that it is the joint and several answer of all the defendants who unite in it.<sup>19</sup>

An answer should be put in as a joint answer, or as a joint and several answer, where the interests of the parties are the same, and they appear by the same solicitor. By the practice of the English chancery costs could be taxed against a solicitor if it appeared that the expense of the suit had been materially increased by the putting in of separate answers for several defendants when a joint and several answer for all would have served the purpose.<sup>20</sup>

The answer of a husband and wife, when they are sued as husband and wife, is a joint answer, and it should so recite.<sup>21</sup>

<sup>17</sup> *Hale v. Continental Ins. Co.* (1863) 16 Fed. 718.

<sup>18</sup> *Bronson v. La Crosse & M. R. R. Co.* (1863) 2 Wall. 283, 17 L. ed. 725.

<sup>19</sup> *Davis v. Davidson* (1846) 4 McLean 130, Fed. Cas. No. 3,631.

<sup>20</sup> 2 Dan. Ch. Pr. 266.

<sup>21</sup> 2 Dan. Ch. Pr. 266.



**§ 690. Adoption of Answer of Co-defendant.**

Where there are several defendants having similar interests and defenses and one of them has answered, his answer may be adopted by the others or by any one or more of them. All that is necessary to this end is that the defendant desiring to adopt the prior answer of the other should file a brief and formal answer stating merely that he has read the answer in question, that the contents of the same are true, and that he therefore adopts it as his own. If the answer adopted contains statements put forth on information and belief only, the person adopting the answer should state that so far as the statements of the answer are made on information and belief, he believes them to be true. Furthermore, a defendant desiring to adopt an answer may do so though he has no personal knowledge of matters put forth in the answer on the personal knowledge of the defendant first answering. In such case the defendant adopting the answer should qualify by saying that he has no personal knowledge of those matters but that on information he believes them to be true.<sup>22</sup>

*Form of Answer and Practice Incident to Filing.***§ 691. Caption and Title of Answer.**

The answer should have a caption, or heading, correctly corresponding with the style of the cause in which it is filed; but an incorrect heading prefixed to an answer supplies no ground of legal objection to the answer. When attention is called to the defect, it should merely be changed on the spot with the permission of the court.<sup>23</sup>

Next after the style of the cause, which is the heading of the answer, follows the title. This states the name of the pleading and the names of the parties in full, thus: The answer of A B, defendant, to the bill of complaint of C D, plaintiff. If two or more defendants join in the same answer, it is entitled as their joint and several answer; or, in the case of husband and wife, as their joint answer. If the answer is improperly entitled, a motion to remove the answer from the files would be proper, but a formal exception will not be entertained for such defect.<sup>24</sup>

If an answer is ordered to be taken off the file for an irregularity

<sup>22</sup> Gibson, *Suits in Chan.* (2d ed.) § 392.

<sup>23</sup> Osgood v. A. S. Aloe Instrument Co. (1895) 69 Fed. 291.

<sup>24</sup> Osgood v. A. S. Aloe Instrument Co. (1895) 69 Fed. 291.

in the title, the defendant may correct it and, with the permission of the court, refile it after having sworn to it again; but if the defect is so grave as to make the pleading a nullity, as would be the case where the pleading purports to be filed in the wrong cause, it may be entirely ignored and a new answer put in.<sup>35</sup>

**§ 692. Reservation of Exceptions for Defects.**

In the body of the answer, it used to be customary for the defendant to begin with a formal reservation of the benefit of all exceptions to the bill because of its errors, uncertainties, and imperfections. This reservation is utterly worthless and should always be omitted as impertinent. No intelligent pleader, we apprehend, would ever think of inserting the clause, except for the fact that out of undue deference to ancient usage the form books continue to perpetuate it from the past. The equity rules and the settled principles of practice prevailing in equity courts point out with certainty the particular modes in which a defendant may obtain the benefit of exceptions for errors, uncertainties, and imperfections in the bill; and a general reservation in the bill is not one of these. There are, to be sure, many defects of a bill that may be taken advantage of by pointing them out in the answer; but the objection must be specific and not general.

**§ 693. Substance of Answer.**

The body of the answer should contain, in clear and orderly statement, a full response to the allegations and charges of the bill. The defendant also states in the body of his answer any matter upon which he wishes to rely in avoidance of the facts stated in the bill. In other words, it is the duty of the defendant in his answer to give adequate and sufficient discovery in regard to the matters alleged; and in addition to this, it is his privilege to plead any defense that will destroy the efficiency of the plaintiff's case.

**§ 694. Concluding Traverse of Matters Not Expressly Admitted.**

By way of conclusion to the body of the answer it is customary to add a general denial or traverse of all the matters charged in the bill that are not expressly admitted to be true in the answer. Strictly speaking, this general traverse, like the reservation often found at the opening of the answer, is of no avail in point of pleading; but

<sup>35</sup> 2 Dan. Ch. Pr. 226, 267.

it may well be retained as a sort of admonition from the defendant that he does not wish to be understood as admitting anything by inadvertence or implication.

### § 695. Prayer of Dismissal.

The prayer of the answer should be that the defendant be dismissed with his costs. If he seeks any other affirmative relief whatever, he must file a cross bill.<sup>26</sup>

### § 696. Paragraphic Divisions of Answer.

The answer, like the bill, should be divided into paragraphs, numbered consecutively, each paragraph containing, as nearly as possible, a separate and distinct response, statement, or allegation. This practice will be found to be not only conducive to brevity and certainty in pleading, but greatly to facilitate reference to the contents of the answer.<sup>27</sup>

### § 697. Signature of Defendant to Answer.

An answer must be signed by the defendant or defendants putting it in, unless an order of court has been obtained dispensing with the signature. An answer put in by a guardian or committee need be signed only by the guardian or committee and not also by the infant or incompetent in whose behalf it is filed.<sup>28</sup>

When the answer appears not to be signed and an exception is taken on that ground, the defect may be cured in open court by affixing the proper signature then and there by leave of the court.<sup>29</sup>

It has been suggested that the signature of a defendant to an unsworn answer ought to be formally attested by his solicitor or by some other respectable witness, and that without such attestation it ought not to be received and filed.<sup>30</sup> We apprehend, however, that the signature of counsel to the answer is to be taken *prima facie* as a certificate to the genuineness of the defendant's signature, though a formal attest is wanting.

### § 698. Leave to File Unsigned Answer.

Under special circumstances the court will permit an answer to be filed by defendant's counsel without the signature of the defendant.

<sup>26</sup> *Weathersbee v. American Freehold, etc. Co.* (1896) 77 Fed. 523.

<sup>28</sup> 2 Dan. Ch. Pr. 269.

<sup>29</sup> *Holton v. Guinn* (1896) 65 Fed.

<sup>27</sup> *Gibson, Suits in Chan.* (2d ed.) § 450.

378.

<sup>30</sup> See 2 Dan. Ch. Pr. 273.

This has been done where the defendant had gone abroad forgetting or not having had time to put in his answer, also where the defendant resided abroad and had given a general power of attorney to defend suits.<sup>21</sup> If the oath to the answer is waived, as it now nearly always is, the court will presumably be indulgent in respect to dispensing with the signature of the defendant, though the signature should be obtained if it is convenient and practicable to do so.

**§ 699. Signature to Answer of Corporation.**

The answer of a corporation should be signed in the corporate name and the same authenticated by its common seal, or if it has no seal, by the signatures of its competent officer or officers. An answer of a municipal corporation is sufficiently authenticated by the signature of the official attorney of such corporation.<sup>22</sup>

**§ 700. Signature of Counsel to Answer.**

Every answer in ordinary course should be authenticated by the signature of the defendant's counsel. This is perhaps required in order that the person signing may, in a proper case, be held responsible to the court for the contents of the answer; or, more likely, it is required as a sort of guaranty of the sufficiency and propriety of the answer. Signature of counsel is, however, required to such answers only as have passed through and under counsel's hand and which have perchance been drawn by him. It is not required in case of answers taken before commissioners under a commission issued for that purpose. Such an answer is in theory, and formerly was in fact, written down by the commissioners, and they, not counsel, are supposed to impart authenticity to it.<sup>23</sup>

A certificate of counsel certifying that in his opinion the answer is well founded in point of law is not required in equity practice.<sup>24</sup>

**§ 701. Oath to Answer—Right of Plaintiff to Waive Same.**

By the immemorial practice of the English chancery and by the usage of all courts of equity in this country, the answer must be verified by the oath of the defendant. To this general rule certain exceptions have always been recognized, and now by equity rule 41, as

<sup>21</sup> 2 Dan. Ch. Pr. 299.

<sup>22</sup> *Seligman v. Santa Rosa* (1897) 81 Fed. 524.

<sup>23</sup> *Davis v. Davidson* (1846) 4 McLean 136, Fed. Cas. No. 3,631.

<sup>24</sup> *McGorray v. O'Connor* (C. C. A.;

1898) 97 Fed. 586, 31 C. C. A. 114. The circuit court rule here relied on as requiring such a certificate appeared to be a rule of practice applicable only in common-law proceedings.

amended in 1871, the plaintiff, in a suit in equity in the federal court, is permitted to waive the oath of the defendant by putting a statement to that effect in his bill. When it is not waived, the oath to the answer is of the utmost importance, as it gives to the answer, so far as the same is responsive to the bill, the full force and effect of the deposition of a competent witness. The answer thus becomes evidence for the defendant.

### § 702. Answer of Peer and Corporation.

In the English practice the most important exceptions to the rule requiring the answer to be sworn to are presented in the cases of peers of the realm and corporations aggregate. A peer is privileged to put in his answer upon an attestation of honor; and a corporation aggregate is allowed to put in its answer under its common seal.<sup>35</sup> The latter of these two exceptions is recognized in the federal courts. A corporation answers a bill under its common seal and not on oath.<sup>36</sup> If a bill asks for discovery under oath from a corporation, the prayer may be ignored as to the oath. Where the corporation answers under its seal, the answer must be stated to be made according to the knowledge, information, and belief of its officers.<sup>37</sup>

### § 703. Oath to Joint and Several Answer.

A joint answer or joint and several answer must be sworn to by each of the defendants whose answer it purports to be. If there are three defendants who answer jointly and only two of them swear to the answer, it will, on motion, be stricken from the files. But the two defendants who have sworn to the answer may, by leave of the court, amend by striking out the name of their co-defendant who did not verify and thereupon refile the answer exclusively as their own; or an order could be made permitting the answer to stand as the answer of the two only, without forcing it off the files.<sup>38</sup>

<sup>35</sup> 2 Dan. Ch. Pr. 270.

<sup>36</sup> *Haight v. Proprietors Morris Aqueduct* (1826) 4 Wash. C. C. 601, 605; *if an officer of a corporation is joined as a defendant for purposes of discovery, he must put in a sworn answer. This is his answer, not the answer of the corporation.* *Gamewell Fire-Alarm Tel. Co. v. Mayor*, etc. (1887) 31 Fed. 312. In *Osgood v. A. S. Aloe Instrument Co.* (1895) 89 Fed. 291, it seems to have been supposed that the answer of a corporation ought to be verified by the oath of an officer. But this is incorrect. Of course

<sup>37</sup> *French v. First Nat. Bank* (1874) 7 Ben. 488, Fed. Cas. No. 5,099.

<sup>38</sup> *Bailey Washing etc. Co. v. Young* (1874) 12 Blatchf. 199, Fed. Cas. No. 751.

### § 704. Who May Administer Oath.

The oath to the answer may be administered by any person qualified under the laws of the United States or under the equity rules to administer oaths, such as a judge or justice of a federal court,<sup>39</sup> a notary public,<sup>40</sup> a clerk or deputy clerk of the United States courts,<sup>41</sup> a United States commissioner,<sup>42</sup> a master in chancery appointed by a circuit court,<sup>43</sup> a judge of any state or territorial court,<sup>44</sup> any commissioner appointed by a federal court to take a deposition, or a justice of the peace.<sup>45</sup>

If an answer is sworn to before a justice of the peace it must be accompanied by a certificate that such examining officer was a justice of the peace for the particular county where the oath was administered and at that time. The certificate of the justice himself is not sufficient to prove this fact.<sup>46</sup>

A certificate of an American consul is sufficient to authenticate the official character of a notary public of a foreign port.<sup>47</sup>

### § 705. Solemn Affirmation in Lieu of Oath.

By equity rule 91 it is provided that a person conscientiously scrupulous of taking an oath may in lieu thereof make a solemn affirmation of the truth of the statements made by him. Such an affirmation should no doubt recite that the person making it is conscientiously scrupulous of taking an oath.<sup>48</sup>

### § 706. Striking Unsworn Answer.

The want of a proper verification of the answer, in a case where an oath is required, is a defect that may be taken advantage of by a

<sup>39</sup> Sec. 725 R. S.; 4 Fed. Stat. Anno. 534; Equity Rule 59.

<sup>40</sup> Sec. 1778 R. S.; 4 Fed. Stat. Anno. 165.

<sup>41</sup> 29 Stat. L. 184; 4 Fed. Stat. Anno. 80.

<sup>42</sup> In the exercise of the power formerly exercised by commissioners of the circuit court. 29 Stat. L. 184; 4 Fed. Stat. Anno. 79; sec. 1778 R. S.

<sup>43</sup> Equity Rule 59.

<sup>44</sup> Equity Rule 59.

<sup>45</sup> *United States v. Cowing* (1835) 4 Cranch C. C. 613, Fed. Cas. No. 14,890; Equity Rule 59.

<sup>46</sup> *Addison v. Duckett* (1806) 1 Cranch C. C. 349, Fed. Cas. No. 77. Eq. Prac. Vol. I.—28.

An answer being sworn before an alderman of the city of Richmond, who was *ex officio* justice of the peace, was accompanied by a certificate of the mayor as to the official character of the alderman, and the official character of the mayor was certified by the clerk of the court of hustings. This was held to be sufficient. *Wright v. West* (1806) 1 Cranch C. C. 303, Fed. Cas. No. 18,102.

<sup>47</sup> *Wilson v. Stewart* (1803) 1 Cranch C. C. 128, Fed. Cas. No. 17,837.

<sup>48</sup> Section 1 R. S. declares that the requirement of taking an oath shall be deemed to be complied with by the making of an affirmation in judicial form. But that statute applies only to a re-

motion to strike the answer from the files. It supplies no ground for an exception to the answer for insufficiency.<sup>49</sup>

#### § 707. Special Order of Court Permitting Filing of Unsworn Answer.

Before equity rule 41 made it possible for the plaintiff to waive the oath and thereby deprive the defendant of the privilege of answering under oath, the general rule of practice was that the answer must always be sworn to, and that rule still prevails unless the oath is waived. However, upon the consent of both parties, the court would formerly make an order permitting the answer to be put in without the oath of the defendant. This was only done in friendly suits where both parties consented.<sup>50</sup> Without such a preliminary order the plaintiff had no power to dispense with the defendant's oath, and an express waiver of the oath in the bill was of no effect. The defendant had the unquestionable right, in the absence of the court order, to swear to his answer and thereby make it evidence in his own behalf.<sup>51</sup> As the plaintiff could not prevent the defendant from answering under oath, so the defendant could not escape from the necessity of so doing; and if an answer was put in without the oath, it was subject to objection on the part of the plaintiff. Neither party could, of his own motion, escape from either the necessity or the consequences of a sworn answer.

#### § 708. Waiver of Oath under Equity Rule.

It is to be noted that under equity rule 41 the waiver of the defendant's oath must be expressly mentioned in the bill. If nothing is said in the bill as to whether the answer should be sworn to or not, the defendant should answer under oath;<sup>52</sup> and so far as the state-

quirement of an oath in the Revised Statutes, and it cannot be construed to apply to oaths required by other rules of law.

<sup>49</sup> *Osgood v. Aloe Instrument Co.* (1895) 89 Fed. 291.

<sup>50</sup> 2 Dan. Ch. Pr. 271. But on the motion of the plaintiff without the consent of the defendant, an order would be entered that the defendant should be at liberty to put in an answer without the oath. *Codner v. Hersey* (1812) 18 Ves. Jr. 468. Here the rights of the defendant are conserved by leaving it to his choice whether the answer shall be put in without the oath or not.

<sup>51</sup> *Holbrook v. Black* (1854) Fed. Cas.

No. 8,580; *Amory v. Lawrence* (1872) 3 Cliff. 523, Fed. Cas. No. 336; *Heath v. Erie Ry. Co.* (1871) Fed. Cas. No. 8,306; *Claments v. Moore* (1867) 6 Wall. 299, 18 L. ed. 788. In this case it was said: "The complainants waived an answer under oath by this defendant. Her answer is nevertheless verified by an affidavit. This was proper. It was her right so to answer, and the complainants could not deprive her of it. Such is the settled rule of equity practice where there is no regulation to the contrary."

<sup>52</sup> *Conley v. Nailor* (1896) 118 U. S. 127, 30 L. ed. 112.

ments of such an answer are responsive, they have the probative weight always given to the sworn answer.<sup>53</sup>

#### § 709. Exhibits to Answer.

The answer should be accompanied by all appropriate exhibits. These are in legal effect made part of the answer by reference though not actually incorporated in it.

An answer setting up, as a bar, the dismissal of a prior suit concerning the same subject-matter should be accompanied by the record in that suit as an exhibit; or, if not this, the answer should at least state the substance of the record with sufficient accuracy and fullness to show that the adjudication in that suit constitutes a bar. And the answer so setting up new and affirmative matter must be supported at the hearing by the record as proof.<sup>54</sup>

#### § 710. Filing of Answer—Presumption of Regularity.

The answer being prepared, signed, and verified, the next thing to be done is to file it with the clerk of the court. This should be done within the time limited for answering. The clerk, on receiving the answer, should mark the document as filed and note the date. A paper purporting to be an answer and found among the papers where it ought to be, will be presumed to have been properly filed, although the fact of filing is not noted on the paper, where it appears that the record is old and there is a probability that the pleading has been mutilated by loss of the cover. The maxim *omnia rite esse acta præsumentur* applies.<sup>55</sup>

#### § 711. Leave to File Answer out of Usual Course.

A defendant who fails to put in an answer to the merits or who puts in an answer consenting to the proceedings set in motion against him, may at a later juncture, on good cause shown, be permitted to put in an answer setting up a defense. The application is, however, directed to the discretion of the court, and will be granted only upon such occasions and conditions as the court thinks proper.

*Central Trust Co. v. Texas etc. R. Co.* (1885) 23 Fed. 846: A railroad company, being defendant to a receivership cause, consented to the proceedings against it

<sup>53</sup> *Dravo v. Fabel* (1889) 132 U. S. 487, 33 L. ed. 421.

<sup>54</sup> *Boyd v. Wyley* (1883) 18 Fed. 355.

<sup>55</sup> See *Bank v. Beverly* (1843) 1 How. 134, 151, 11 L. ed. 75.



and made no defense for a year and a half. Application was then made for leave to file an answer and defend. In view of the fact that the court had been administering the property for some time through the hands of a receiver with the consent of the defendant, it was clearly of the opinion that the application should not be granted. But in order that the question might stand on formal adjudication rather than on an order involving a mere exercise of discretion, it was ruled that the defendant should have leave to tender an answer within ten days supported by affidavits explanatory of the delay and that, if the answer should show a meritorious defense, the same might then be filed after inspection by the court. It was also ruled that, in the event the answer should be received, the plaintiff should have leave to file his replication forthwith, in order that the cause might not be delayed.

### § 712. Withdrawal of Answer by Leave of Court.

After an answer has been filed it often happens that the defendant wishes to withdraw his answer in order to avail himself of a more speedy and less extended mode of defense, as, for instance, motion to dismiss, demurrer, or plea. In a proper case an application for this purpose will be granted, if the court sees that the defendant really seeks a determination of the controversy and is not merely playing for delay.

An application for leave to withdraw a general answer to the merits and to substitute in its stead a plea supported by an answer will be granted where it appears that thereby the issue on which the suit must turn may be limited to comparatively narrow bounds.<sup>56</sup>

Leave to withdraw an answer will not be granted, at least to adult parties, after the suit has proceeded through various stages extending over a period of six years during which time the court has acted on the answer as an admission of the facts stated in the bill and has decreed accordingly.<sup>57</sup>

### § 713. Striking Answer for Informality.

If an answer is objectionable in any feature the plaintiff must proceed at the proper time and in the right way to call the attention of the court to its particular defect. In examining an answer the plaintiff will naturally first consider whether the answer is in proper form. If it fails to comport with the forms required by the practice of courts of equity, the proper procedure is to move to strike it from

<sup>56</sup> *United States v. American Bell Tel. Co.* 128, 39 L. ed. 921; *White v. Miller* (1889) 39 Fed. 716. (1896) 15 Sup. Ct. 783, 159 U. S. 128.

<sup>57</sup> *White v. Joyce* (1895) 168 U. S. 39 L. ed. 921.

the files.<sup>58</sup> The same course is followed where the answer is filed under conditions not allowable by the rules of the court. But an answer will not be stricken on the ground that it is delusive, answering only a few facts stated in the bill. The remedy in this case is to except for insufficiency.<sup>59</sup>

#### § 714. Effect of Answering to Merits.

The filing of an answer to the merits operates as a waiver of the benefit of any matter that would have been available as a ground of a preliminary motion or demurrer. Thus after answer is filed, the defendant cannot test the question of the legal sufficiency of the bill by demurring.<sup>60</sup>

#### *Elements of Answer.*

#### § 715. Function of Answer as Defensive Pleading.

We have already defined the answer as the defendant's written response to the allegations and charges of the bill. As a pleading the answer differs from the demurrer in the feature of its responsiveness. While a demurrer challenges the sufficiency of the case made in the bill, the answer meets the statements of the bill by admitting them, or it refutes them by denials of their truth. The answer may also set up affirmative and independent facts to destroy the efficacy of the case made in the bill, a thing the demurrer can never do.

#### § 716. Two Elements Contained in Answer.

The answer differs from all other pleadings known to the law in the circumstance that, in addition to being a mere pleading, it is also a species of proof. The answer to a bill in equity, in so far as it is responsive to the charges thereof, is evidence and has all the force and effect of the deposition of a witness. The answer therefore contains two entirely different sorts of matter; or as otherwise may be said, the matter contained in the answer serves two distinct purposes. As the bill contains both a statement of the plaintiff's cause of action and also charges of evidence to be disclosed by the defendant, so the answer contains both a statement of the defendant's defense and also

<sup>58</sup> See *McGorray v. O'Connor* (C. C. A.; 1906) 31 C. C. A. 114, 87 Fed. 586.

<sup>59</sup> 1 Smith, Ch. Pr. (2d ed.) 268.

<sup>60</sup> *Betts v. Lewis* (1856) 19 How. 73, 15 L. ed. 576.

responsive answers to the plaintiff's charges of evidence. The circumstance that the answer serves the double function of being both a defensive pleading and also a vehicle of disclosures, or discovery, has caused no little confusion in equity pleading; for the answer has been often treated as if it were homogeneous, and every part of it subject to the same rules. A clear perception of the different functions of the answer is essential to any intelligent presentation of the subject, and accordingly we must now resolve the answer into its elements and consider these elements separately. It would seem that logically the answer ought first to be treated in its aspect as a defensive pleading and then in its aspect as a vehicle of discovery, but for reasons that will perhaps be manifest, it is desirable to follow the reverse order and first treat of the answer as a vehicle of discovery.

#### **§ 717. Parts of Bill to Which Answer Responds.**

In our treatment of the structure and contents of the bill it appeared that the bill contains certain distinct formal parts. To three of these, reference must here be made: the stating part, the charging part, and the interrogating part. In the stating part are set forth the facts which constitute the basis of the plaintiff's claim to relief. This part of the bill constitutes the plaintiff's pleading in the proper and technical sense. In the charging part of the bill are the charges of evidence, inserted for the purpose of obtaining discovery. The interrogating part of the bill is an adjunct of the charging part, the interrogatories being put solely for the purpose of drawing out the evidence more fully and effectually. In considering the bill, it was observed that while the functions of the stating and charging parts of the bill are theoretically distinct, those parts have always been, as a matter of fact and practice, more or less amalgamated. In most cases the bill is made up of a single consistent narrative, and the solicitor who draws the bill makes no attempt formally to separate the two elements. In fact, the two parts of the bill are rather the names of two functions than two formal separate parts.

#### **§ 718. Blending of Two Elements of Answer.**

This amalgamation of the two formal parts of the bill is reflected, of course, in the answer; and we consequently find that while the answer serves two functions the two elements are not kept, and cannot be kept, formally distinct. The answer to the stating part constitutes the defendant's technical pleading, and the answer to the

charging part constitutes the evidence discovered by him; but instead of being separate the two elements are combined into one consistent writing. In analyzing the answer, we must therefore consider the two functions rather than the two formal parts. Of course, the answers to the specific interrogatories comprise a formal distinct and separate part of the answer, but as the interrogatories are a mere adjunct to the charging part of the bill, so the responses to the interrogatories are a mere adjunct to the answer proper. Hence the interrogatories and the answers thereto may be left out of consideration for the time being.

*Answer as Vehicle of Discovery.*

**§ 719. Defendant Must Answer Whole Bill by Way of Discovery.**

One notable result of the amalgamation of the stating and charging parts of the bill, and the consequent amalgamation of the answer as regards those two parts, or features, of the bill, becomes manifest as soon as the defendant comes to consider what he must put into the answer in order to satisfy the plaintiff in the matter of discovery. The law is settled that a plaintiff in equity is entitled to a discovery of all evidence material to his case, provided the proper charges of evidence are inserted in his bill; but when the stating part and charging part are amalgamated every part must be taken *diverso intuitu* both as a pleading and as a basis of discovery. The defendant therefore, in order to make his answer sufficient in respect of discovery, must answer the whole bill as if it contained charges of evidence and nothing more. It will not do for him to attempt to separate the statements and charges of the bill and to say of one allegation that it is a statement of the plaintiff's cause of action considered as a pleading—which need not be answered by way of discovery—and of another allegation that it is a charge of evidence that must be answered by way of discovery. No: the rule is invariable and unbending that the defendant, in answering by way of discovery, must answer the whole bill, and not merely the charging part of the bill. This rule is the only practicable one that could possibly have been adopted on this point, for as soon as the court of equity once gave its sanction to the practice of allowing the plaintiff to combine the stating and charging parts of the bill into one pleading, it was but natural that the two elements should so far coalesce as to make it necessary for the defendant, in answering by way of discovery, to answer the whole bill and every distinct and material allegation contained in it.

### § 720. Answer Must Be Full and Explicit.

The next point to be determined is one concerning the extent of the discovery to be made. How specific must the answer be? Must it go into detail and state particulars, or may the defendant be content to give general answers? The reply to this question must depend in some measure on the nature of the allegations of the bill. The defendant must answer specifically where the allegations call for specific answers, and he may answer generally where the bill calls for a general answer. But the great principle to be observed is that a defendant who submits to answer at all must answer fully. This is the rule applicable to the statements and disclosures of the answer without regard to the specific interrogatories. The interrogating part of the bill is only added to it to enable the plaintiff to get more specific and more direct response than he might otherwise succeed in getting; and the fact that specific interrogatories are put does not change the rule that in the body of his answer the defendant must answer fully all the allegations and charges contained in the body of the bill. For the present then we ignore the possible presence of interrogatories and consider only the obligation of the defendant to answer the allegations and charges of the bill. The general rule here is, as stated, that the defendant must give a full, explicit, and satisfactory response to all the material allegations of the bill.<sup>61</sup> A defendant is bound to answer allegations inserted in the bill concerning anticipated matters of defense, as well as matter constituting the primary basis of the suit.<sup>62</sup>

### § 721. Answer to Bill Based on Information and Belief.

The fact that the most material averments in a bill are made merely on information and belief supplies no reason why the defendant should not be required to answer fully. Especially is this true in a case where the facts revealed are such as the plaintiff could not reasonably be expected to know about personally.<sup>63</sup>

### § 722. Answer of Corporation—Duty of Officers.

A corporation, although not compellable to answer under oath, is required to answer every material allegation of the bill. It must

<sup>61</sup> The rule requiring the defendant in his answer to respond to all the material allegations of the bill is not modified in the federal courts by the circumstance that by a statute of the state where the court is sitting, all allegations of the bill not specifically denied in the answer are admitted to be true. *Commonwealth Title etc. Co. v. Cummings* (1897) 83 Fed. 767.

<sup>62</sup> *McClaskey v. Barr* (1889) 40 Fed. 559.

<sup>63</sup> *Leavenworth v. Pepper* (1887) 32 Fed. 718.

answer as fully as any other defendant.<sup>64</sup> Officers of a corporation who answer for it are bound to make all inquiries necessary to enable them to put in a full and proper answer. If not in office at the time the transactions inquired about occurred, they must seek information from the records of the corporation and from the former officers, if possible.<sup>65</sup>

### § 723. Insufficient Answer.

The answer must be direct and unequivocal. An evasive, inconsistent, or noncommittal statement is bad. If a defendant fails to give the discovery to which the plaintiff is entitled, the answer is said to be insufficient; and the plaintiff may file exceptions to the answer for insufficiency. The practice in regard to these exceptions will be considered hereafter. On the question as to when an answer is or is not sufficient, the following cases and quotations from the opinions of the court therein are instructive.

1. *Brown v. Pierce* (1868) 7 Wall. 211, 19 L. ed. 125: "The material allegations in the bill of complaint ought to be answered, and admitted or denied, if the facts are within the knowledge of the respondent; and, if not, he ought to state what his belief is upon the subject, if he has any; and, if he has none, and cannot form any, he ought to say so, and call upon the plaintiff for proof of the alleged facts, or waive that branch of the controversy."

2. *Holton v. Guinn* (1895) 65 Fed. 459: In a bill seeking partition and an assignment of dower, it was alleged that the oratrix was the widow of one Elijah Lloyd and that the two other orators were his heirs. The answer denied generally every allegation of the bill not expressly admitted to be true, and this denial extended to the relation of the orators to the deceased Elijah Lloyd. It was objected to the answer that it did not specifically deny or admit the relationship in question. It was held that the answer should be made more specific. Said the court: "In equity pleading, designed to search out the conscience of the party, and to put him to the very truth of the matter, all semblance of double and evasive pleading should be avoided, so as not to leave the adversary to seek out through the whole body of the pleading, and determine at his peril, precisely what is intended to be admitted and what controverted. Specific and direct denials or admissions not only tend to define and sharpen the issues, but better enable the parties to prepare for trial, and save costs and trouble in taking testimony on matters not in good faith controverted."

3. *McClaskey v. Barr* (1893) 40 Fed. 559: In a suit for partition the bill expressly charged that the defendant claimed title to the land in controversy under a particular person, the same under whom plaintiff also claimed by inher-

<sup>64</sup> *Whittemore v. Patten* (1897) 81 Fed. 527, 528; *Gamewell Fire-Alarm Tel. Co. v. Mayor etc.* (1897) 31 Fed. 312; No. 7,859.  
<sup>65</sup> *Kittredge v. Claremont Bank* (1846) 1 Woodb. & M. 244, Fed. Cas.  
*Colgate v. Compagnie Francaise* (1895) 23 Fed. 82, 23 Blatchf. 38.

itance; and further the bill charged that the defendant had no claim to the land except under that person. It was held that the defendant was bound to answer an allegation of the bill concerning a conveyance constituting a link in the chain of title, which conveyance tended to show that the parties were co-tenants.

4. *Guinea v. Agnelly* (1872) 1 Woods 238: In a bill to establish title to real property the plaintiff expressed ignorance of the title under which the defendant claimed and called on the defendant to show by what title he claimed. The defendant showed a sufficient title to lay a foundation for a prescription, and on that ground rested his defense. It was held that the answer was sufficient and that the defendant could not be required to go further and respond to an interrogatory as to whether the property in question was not a part of a particular estate with which no connection was charged or shown.

#### § 724. Specific Interrogatories Not Necessary to Enforce Full Discovery.

It is to be noted that the duty of the defendant to answer fully all the allegations and charges of the bill is in no wise affected by the presence or absence of special interrogatories. This established rule of equity pleading was abrogated, so far as the federal courts are concerned, by equity rule 40 as originally adopted in 1842. This rule declared that a defendant should not be bound to answer any statement or charge in the bill unless specially interrogated upon it.<sup>66</sup> As a result of the adoption of this rule, the discovery feature was eliminated from the bill, save in so far as it might be preserved in the special interrogatories. This would have served completely to divorce the discovery element in the bill from the element of pleading. From the theoretical point of view the departure may have had something to commend it; but the innovation ran counter to the immemorial practice of the court and it was abolished in 1850.<sup>67</sup> This restored the ancient rule that the defendant must always answer fully every material allegation of the bill whether he is specially interrogated or not.<sup>68</sup>

<sup>66</sup> *Treadwell v. Cleaveland* (1848) 3 McLean 283, Fed. Cas. No. 14,155, was decided under Equity Rule 40 as originally promulgated. In this case it was intimated that, since the adoption of that rule, a defendant could never be held to be in default for not answering a bill that contained no specific interrogatories. Hence, a *pro confesso* could not be taken against him for failing to answer at all. Such a bill, it was said, was fatally defective and demurrable for not being in form to require an answer. But this was evidently not the meaning of that rule as originally framed. It should have been read as if framed thus, "A defendant

shall not be bound to answer by way of discovery any specific statement or charge in the bill, unless specially and particularly interrogated thereto." The rule does not mean that a bill is bad which lacks specific interrogatories. Such a bill, if it states a case for relief, is good and must be answered. The defendant must answer to the equity of the bill, though he is not bound to discover specific facts. Happily the rule was not long retained.

<sup>67</sup> Amendment to Equity Rule 40 (December Term 1850).

<sup>68</sup> *Way v. Hygienic etc. Co.* (1906) 144 Fed. 870.

**§ 725. When General Answer Sufficient.**

A general answer is a sufficient answer to general allegations. If the plaintiff wants to get at particulars he must make specific charges or put specific interrogatories.

*Parsons v. Cumming* (1871) 1 Woods 461, Fed. Cas. No. 10,775: Mr. Bradley, Circuit Justice, discussing the sufficiency of answers to general charges, said: "If a bill does not contain specific interrogatories, the complainant must be satisfied with such answer to its allegations as would fairly occur to the professional mind as meeting them in a substantial manner. The defendant is not bound to exercise ingenuity in finding out all the aspects in which a statement may be taken. For example, if the bill contain a general allegation of fraud or breach of duty, or failure to fulfil a trust, it may be the foundation of many specific interrogatories as to particular facts going to prove the allegation made; but if such interrogatories be not propounded, the defendant's answer may be as general as the allegations of the bill."

**§ 726. When Answer Must Deny Information and Belief as Well as Knowledge.**

If the defendant has no knowledge as to the truth of a particular allegation in the bill, he must, in his answer, so state; and he must also state his information and belief on that point, if he has any. A mere averment of want of knowledge without stating the defendant's information and belief is bad pleading.<sup>69</sup> However, as regards purely negative averments, if the defendant denies knowledge and information he need not state his belief. One who has no knowledge or information tending to establish a particular fact can have no opportunity for a belief of the existence of such fact.<sup>70</sup>

A denial based on information and belief is not sufficient, unless a want of knowledge is also averred. An answer on "information and belief" only must be considered evasive.<sup>71</sup>

**§ 727. Immaterial Allegations Need Not Be Answered.**

Surplusage in the bill being necessarily irrelevant need not be answered.<sup>72</sup> The answer need not respond either by admission or denial to an allegation in the bill which is so far immaterial and

<sup>69</sup> *Kittredge v. Claremont Bank* (1846) 1 Woodb. & M. 244, Fed. Cas. No. 7,859; *Bradford v. Geiss* (1825) 4 Wash. C. C. 513, Fed. Cas. No. 1,768. <sup>71</sup> *Burpee v. First Nat. Bank* (1873) Fed. Cas. No. 2,185. 5 Biss. 405; *Taylor v. Luther* (1835) 2 Sumn. 228, Fed. Cas. No. 13,796. <sup>72</sup> *Victor G. Bloede Co. v. Carter* (1906) 148 Fed. 127. *Peters v. Tonapah Min. Co.* (1903) 120 Fed. 587.



irrelevant to the equity of the bill that an answer would not affect the case.<sup>73</sup>

### § 728. Negative Pregnant in Answer.

An answer embodying a denial of an allegation in the bill and shaped precisely in the words of the allegation with an added negative, is almost necessarily insufficient, because of its evasiveness and because of the pregnancy of the negative. Thus in a suit for an accounting of sales of certain implements, the bill alleged that during a particular year the defendant sold a particular number of those implements for a particular aggregate sum. The defendants simply denied that they sold that number for the sum mentioned. The answer was held to be insufficient. The denial might be strictly true and yet the plaintiff might be entitled to relief because a larger or smaller number had been sold. The equity of such a bill is addressed to the matter of accounting for the sales whether they be numerous or few. The answer must respond to the equity of the bill.<sup>74</sup>

### § 729. Discovery as Affected by Answer Containing Plea in Bar.

The principle that a defendant who submits to answer must answer fully is subject to qualification in the case where the answer contains matter of a plea in bar. The exception here stated is embodied in equity rule 39, and as it pertains only to answers containing matter of a special plea in bar, a discussion of the effect of this equity rule must be postponed.<sup>75</sup>

### *Answer to Interrogating Part of Bill.*

### § 730. Answer to Specific Interrogatories.

We now come to consider the matter of answering the interrogatories. As previously stated the interrogatories are a mere adjunct of the charging part of the bill. They are added for the purpose of varying the charges of evidence and obtaining a fuller and more particular discovery than could otherwise be had. As regards the duty of the defendant to answer specific interrogatories, the general principle to be borne in mind is that all questions should be answered that are material and relevant, provided they are based on some

<sup>73</sup> *Hardeman v. Harris* (1849) 7 How. 726, 12 L. ed. 889; *Stockton v. Ford* (1850) 11 How. 232, 13 L. ed. 676.

<sup>74</sup> *Whittemore v. Patten* (1897) 84 Fed. 51.

<sup>75</sup> See post, §§ 1009-1014.

fact, or are included in some issue, contained in the bill. The interrogatories are no part of the substance of the bill. Hence they cannot be made a *basis* either of discovery or of relief. An interrogatory that is addressed to the discovery of some fact not put in issue need not be answered.<sup>77</sup> Though a plaintiff may expand his interrogatories so as to cover every incident of the facts alleged, he cannot interrogate as to matters not thus put in issue by him. If interrogatories are propounded as to facts beyond the scope of the inquiry to which the bill is legitimately addressed, the defendant may omit to answer, and have the propriety of the questions tested on exceptions to his answer, if the plaintiff sees fit to resort to exceptions. But if the matter called for by an interrogatory is necessary to a proper understanding of the issues or will serve to enlighten the court as to the meaning of a contract that is the basis of the suit, the question should be answered.

*Fuller v. Knapp* (1885) 24 Fed. 100: Under a contract of insurance known as the "reserve dividend" policy, the policy-holder cannot require the company to apportion any particular sum annually as a dividend out of its net earnings. Much less can he require a sum to be so apportioned which might have been realized as net income if the company had conducted its business efficiently. The contract is that the policy holder shall have such dividends as the managers in their discretion see fit to declare. Consequently, in a suit on such a policy, interrogatories need not be answered that are addressed to the point of the general earnings of the company, its expenses, and losses while the policy has been in force. The answer to such interrogatories could be material only if the law were quite different from what it is in regard to these policies.

In the same suit the plaintiff interrogated the defendant as to the meaning of the term "reserve dividend plan" as used in the policy of insurance. The policy itself contained no description of the plan, but the bill made certain allegations as to what was meant by it. The answer denied that the plan was such as plaintiff alleged it to be. It was held that the defendant must answer the interrogatory and show what the plan actually was. The policy could not be understood without an explanation of the term, and the defendants were properly called on to explain it.

Before a defendant can justify a refusal to answer an interrogatory on the ground that it is immaterial, it must appear that an answer to that interrogatory, whether in the affirmative or negative, could not tend either to prove or disprove the bill. It is not required that the answer should appear to be decisive of the case, but only that it will tend to prove it.<sup>78</sup>

<sup>77</sup> *Mechanics Bank v. Lynn* (1828) 1 Pet. 376, 7 L. ed. 185.

<sup>78</sup> It has been said that the criterion of immateriality is not whether an affirmative answer would prove the bill, but whether it would tend to prove it.

### § 731. Form and Extent of Defendant's Denials.

In answering specific interrogatories the defendant should give such information as he is possessed of.<sup>79</sup> If the defendant denies having any knowledge on the point to which the interrogatory is addressed, he should so state; and he should also state that he has no information on that point; for if he has information it is his duty to tell what that information is.<sup>80</sup>

Where an interrogatory can be answered directly in a few words, it should be so answered; and if the defendant instead of doing this frames his answer so that the plaintiff, in order to find the answer to the particular interrogatory, is compelled to search through several pages of the answer, an exception will lie.<sup>81</sup>

### § 732. Answer Based on Information and Belief.

An answer based on information and belief must be clear and unambiguous, and it must reflect the belief of the respondent himself. A statement of what somebody else believes coupled with the suggestion that the respondent has no information or belief to the contrary is insufficient.

*Brooks v. Byam* (1840) 1 Story, 296, Fed. Cas. No. 1,947: In a bill concerning a patent right the respective parties claimed under different assignments from the original patentee. The validity of these assignments was in issue and the question was relevant whether one B., a person constituting a link in the chain of defendant's title, had notice, at the time he obtained his title, of the existence of the other assignment. An interrogatory called on the defendant to make full, true, particular, and perfect answer on this point, not only according to the best of his knowledge but to the best of his information, hearsay, and belief. The defendant answered that he did not, of his own knowledge, know whether at the time of the assignment to B. the latter had any information, or knowledge, or had any cause to believe, that the patent had previously been assigned to another through whom plaintiff claimed; but the defendant also answered that he had been told by said B. that at the time the latter acquired his title he had no knowledge, information, or cause to believe, that the previous assignment had been made. The answer continued: "and this defendant has no knowledge, information, or belief, that the information so

*Uhlmann v. Arnholt etc. Co.* (1890) 41 Fed. 369. This way of putting the principle is perhaps open to objection, in that it assumes that all interrogatories are so framed that the plaintiff's case will be assisted only by an affirmative answer. This is not necessarily so.

<sup>79</sup> *John D. Park & Sons Co. v. Bruen* (1906) 147 Fed. 884.

<sup>80</sup> An answer of a defendant to the effect that "he does not know and cannot set forth as to his belief or otherwise whether, etc." is in bad form. Though such an answer denies knowledge, it does not deny information. *Victor G. Bloede Co. v. Carter* (1906) 148 Fed. 127.

<sup>81</sup> *Way v. Hygienic etc. Co.* (1906) 144 Fed. 870.

derived from the said B. is not true." This answer was excepted to as insufficient and the exception was sustained by Story, J. The answer should have stated the defendant's own belief. By the form of his answer he left it doubtful whether he believed that statement or was unable to form a belief. And the plaintiff had a right to know positively which of the two was his real predicament.

In this case the learned judge made the following important observations concerning the frame and effect of answers made on knowledge, information, or belief: "In the case of an interrogatory, pertinent to a charge in the bill, requiring the defendant to answer it 'as to his knowledge, remembrance, information, and belief' (which is the usual formulary) it is not sufficient for the defendant to answer as to his knowledge; but he must answer also as to his information and belief. The plain reason is, that the admission may be of use to the plaintiff as proof, if the defendant should answer as to his belief in the affirmative, without qualification. Thus, although a defendant should state that he has no knowledge of the fact charged, if he should also state that he has been informed and believes it to be true, or simply that he believes it to be true, without adding any qualification thereto, such as that he does not know it of his own knowledge to be so, and therefore he does not admit the same, it would be taken by the court as a fact admitted or proved; for the rule in equity generally (although not universally) is, that what the defendant believes, the court will believe. The rule might, perhaps, be more exactly stated, as to its real foundation, by saying that whatever allegation of fact the defendant does not choose directly to deny, but states his belief thereof, amounts to an admission on his part of its truth, or that he does not mean to put it in issue as a matter of controversy in the cause. But a mere statement by the defendant in his answer, that he has no knowledge that the fact is as stated, without any answer as to his belief concerning it, will not be such an admission as can be received as evidence of the fact. Such an answer is insufficient; and, therefore, the defect properly constitutes a matter of exception thereto, since it deprives the plaintiff of the benefit of an admission to which he is justly entitled. However, courts of equity do not, in this respect, act with rigid and technical exactness, as to the manner in which the defendant states his belief, or disbelief, if it can be fairly gathered from the whole of that part of the answer what is, according to the intention of the defendant, the fair result of its allegations."

### § 733. Defendant Not Compellable to Marshal Evidence.

The court will not require a defendant to answer an interrogatory where to do so properly would require him to enter into a tedious and expensive investigation about matters concerning which his information is scanty and that could be as easily found out by the plaintiff himself, if he should make the necessary investigation. A defendant cannot be forced to marshal evidence for the benefit of the plaintiff.<sup>22</sup>

<sup>22</sup> On referring exceptions to an answer to the master in *John D. Park & Sons Co. v. Bruen* (1906) 147 Fed. 384, the court cautioned him that while the

**§ 734. Defendant Not Compellable to Discover Trade Secrets.**

An interrogatory seeking to discover a trade secret need not be answered, but the answer of a defendant to such a question should state the ground on which the refusal to answer it rests. A defendant has, on this ground, been upheld in refusing to answer a question concerning the mode of manufacture of automatic wipers for plate printing presses.<sup>83</sup> But where a question asked for a statement of the mode of construction of a walking track in a gymnasium, it was held that the defendant must answer; because, as such tracks are well known to the public and their construction is easy of ascertainment, the matter called for could not be said to be a trade secret.<sup>84</sup>

**§ 735. Demurrable Interrogatory Need Not Be Answered.**

Under equity rule 44, a defendant can refuse to answer any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer, and this notwithstanding he answers other parts of the bill from which he might have protected himself by demurrer.<sup>85</sup>

**§ 736. Statement of Ground for Refusal to Answer.**

A defendant who avails himself of this privilege should, in his answer, state the ground on which he refuses to answer. This statement should be as clear, full, and specific as a special demurrer is required to be. It should specify the reasons for asking protection, and the particular questions against which protection is sought should be pointed out. A general statement that the defendant claims the same benefit as if he had demurred is not enough.<sup>86</sup>

**§ 737. Only Actual Defendant Must Answer.**

In a suit against a corporation the plaintiff may have discovery under oath of its proper officers. But to this end such officers must be named as defendants, and they must be required to answer the interrogatories upon their oath. No one but a defendant can be compelled to answer the interrogatories in a bill.

plaintiff is entitled to probe the conscience of the defendant thoroughly, he is not entitled to require him to enter upon an exhaustive search in order to discover and marshal evidence which the plaintiff may think material to his case.

<sup>83</sup> Federal etc. Co. v. International etc. Co. (1902) 119 Fed. 385.

<sup>84</sup> Coop v. Development Inst. (1891) 47 Fed. 899 (1891) 48 Fed. 239.

<sup>85</sup> Equity Rule 44.

<sup>86</sup> Boyer v. Keller (1902) 113 Fed. 560.

*French v. First Nat. Bank* (1874) 7 Ben. 488, Fed. Cas. No. 5,099: Only the corporation was made defendant in the bill. Both relief and discovery were sought. Interrogatories were filed and the prayer for discovery was that the corporation might answer, on the oaths of its proper officers, to such of the interrogatories as by the note underwritten those officers were respectively required to answer. The corporation answered the bill under its corporate seal but refused to answer the interrogatories at all. Nor did its officers answer the interrogatories. On exceptions this course was upheld. The corporation did not have to answer the interrogatories because it was not so stated in the underwritten note, and the officers did not have to answer them because they were not made defendants for purposes of discovery.

### § 738. Necessity for Underwritten Note.

The defendant need not answer any of the specific interrogatories to a bill unless the interrogatories he is required to answer are indicated in an underwritten note in accordance with equity rule 41.<sup>67</sup> This rule doubtless contemplates the situation where there are two or more defendants. If there be a single defendant and the bill calls upon him to answer, the need for the underwritten note does not exist.

<sup>67</sup> *Buerk v. Imhaeuser* (1882) 10 Fed. 606; *French v. First Nat. Bank* (1874) 7 Ben. 488, Fed. Cas. No. 5,099.  
Eq. Prac. Vol. I—29.

## CHAPTER XVII.

### THE ANSWER (*continued*).

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*Answer as Defensive Pleading.***§ Party Bound by Facts Stated in Pleading.**

Attention is now to be directed to the answer in its aspect of a defensive pleading, and the first observation we make is that equity pleading, both as regards the bill and answer, proceeds on the general theory that facts are to be pleaded. In proceedings at common law, a party pleads facts according to their legal effect, so far as practicable, and he does not have to be so particular about stating the facts exactly as they will appear to be in evidence. As a consequence of this, a party is not, at law, bound by the statements contained in his pleading, except so far as the pleading is binding as a legal formula for the solution of the case. In equity it is different. Each party is concluded by the statements of fact contained in his pleading. *Qui ponit fatetur* is a maxim that applies in equity both to the bill and answer. Therefore the statements of fact contained in a bill may be read by the defendant, and the statements of the answer may be read by the plaintiff. What either party puts forth as true, his adversary may accept as true.<sup>1</sup>

**§ 740. No Constructive Admissions.**

Another point to be noted here is that in equity pleading there is no such thing as a constructive admission resulting from a failure to

<sup>1</sup> Langdell, Eq. Pl. 66, 80.



deny a particular fact or from the setting up of a new or collateral fact by way of affirmative defense. In the common-law system every allegation in any pleading upon which a traverse can be properly taken is considered as admitted by the adverse party to be true, unless he traverse it.<sup>2</sup> In equity pleading no such rule applies. The plaintiff can only recover when the case stated in his bill is shown to be true. If his opponent expressly admits it, this is enough; otherwise the allegations of the bill must be proved by competent evidence. However bad an answer may be in form, or however insufficient in substance, it will never operate as a constructive admission of any part of the plaintiff's case. If a defendant ignores a charge, he does not thereby admit it to be true. If the answer neither admits nor denies the allegations of the bill, or is evasive, those allegations must nevertheless be proved by the plaintiff at the final hearing.<sup>3</sup> But on the question of the dissolution of an injunction, allegations of a bill that are not squarely met and denied may be assumed to be true.<sup>4</sup>

#### § 741. General Traverse.

A defendant who is called upon to answer a bill may conceive that the case made in the bill is wholly false or unsustainable in point of fact. In this situation the defendant may safely rely on the inability of the plaintiff to establish his case by proof. Furthermore, it is manifest that as a mere matter of pleading and apart from the consideration of his duty to give discovery, the defendant in such a case is not required to put in any answer at all. If an answer were put in, it would consist exclusively of denials and would be, in effect, merely a general traverse. But a general traverse consisting of a denial of the whole case has no other function than that of preventing a constructive admission, and as there are no constructive admissions in equity pleading, no general traverse is ever necessary to prevent such admissions.<sup>5</sup> If the plaintiff's bill is false in fact, his case is hopelessly weak; and, as a mere matter of pleading, the defendant need put in no answer at all.

<sup>2</sup> See Discovery under the Judicature Acts, C. C. Langdell, 11 Harvard Law Rev. 132.

<sup>3</sup> *Brown v. Pierce* (1868) 7 Wall. 211, 19 L. ed. 135; *Commonwealth Title etc. Co. v. Cummings* (1897) 83 Fed. 767.

While a literal denial in an answer makes it subject to exception for insufficiency, yet if no exception be taken and the case comes up for hearing on the pleadings only, such a denial cannot be

construed as an actual admission of the charge made in the bill. The denial yet avails to keep the burden of proof on the plaintiff. *United States v. Ferguson* (1892) 54 Fed. 28.

<sup>4</sup> *Young v. Grundy* (1810) 6 Cranch 51, 3 L. ed. 149; *Mason v. Jones* (1848) 1 Hayw. & H. 329, Fed. Cas. No. 9,240; *Burpee v. First Nat. Bank* (1873) 5 Bias. 405, Fed. Cas. No. 2,185.

<sup>5</sup> Langdell, Eq. Pl. 79.

But at this point there comes into play the rule that every bill must be answered, and fully answered, by way of discovery, if not otherwise. Consequently it is not possible for the idea just indicated ever to become effectual. Though a defendant might, in point of theory, be excused from pleading when he relies on mere denials of the facts contained in the bill, he is in practice always required to answer because of his duty to give discovery.

Conceding then that the defendant must always answer, even though he does nothing more than deny the truth of the bill, the question next arises whether a general denial, or traverse, of the case stated in the bill is a good answer. The reply to this question must be in the negative. A general traverse is, as we have seen, superfluous and unnecessary as a mere matter of defense; and as a matter of discovery, a general traverse is insufficient. Therefore an answer that merely embodies a general denial of the case made in the bill is always bad in point of pleading and practice.<sup>6</sup> It is not unusual for the solicitor who draws an answer to insert at the conclusion of it a general statement to the effect that every allegation of the bill not expressly admitted is denied. This is merely put in from caution, and it cannot be supposed to have any further effect than perhaps as a mere aid to interpretation.

#### § 742. Affirmative Defense in Avoidance of Case Made in Bill.

If a bill states a good cause of action and the defendant finds that he cannot safely rely on the certainty of disproving its allegations, his only resource is to set up a good affirmative defense; and it is when he is confronted by this necessity that the problem of framing the answer as a pleading assumes its greatest importance.<sup>7</sup> Among the affirmative defenses available to a defendant when specially set forth in the answer are such as these: fraud, account stated, payment, release, award, statute of limitations, rescission, innocent purchaser, usury, infancy, and former judgment.

<sup>6</sup> But if no objection is put in to the sufficiency of the answer, a formal replication should be filed so that the pleadings may be in shape for the proper determination of the issues. *Scor v. Singleton* (1881) 9 Fed. 809.

<sup>7</sup> It has been said that in equity pleading every *defense* implies an affirmative defense, that is, the setting up of some new and impending fact destructive of the efficacy of the case made in the bill. In this view a mere denial, or negation, of the facts stated in the bill is not, technically speaking, considered a defense. Langdell, Eq. Pl. 79. The point is not of much importance, and it is doubtful whether modern usage conforms to the distinction. As a matter of common sense a defendant may be said to make a defense as well when he denies, or negatives, the case made in the bill, as when he sets up an affirmative defense; and probably in the end usage will recognize this fact, if it has not already done so.

**§ 743. Matter in Avoidance Must Be Specially Plead.**

These and all other affirmative defenses must be specially pleaded in the answer. Otherwise the defendant cannot usually take proof in reference to them or, if the proof is taken, he cannot have the benefit of it. It is not an uncommon thing for a defendant to suffer from his failure to set forth in his answer facts constituting an affirmative defense. One who finds himself in this predicament must, at the hearing, if not sooner, get leave to file a supplemental or amended answer, and this concession will of course be granted only on the payment of costs.<sup>5</sup>

**§ 744. Manner of Pleading Defensive Matter.**

The principles that should be observed in pleading defenses by way of avoidance are not different from those followed in framing the bill. Just as the plaintiff is required to set forth the ground of his suit in the bill itself and to notify the defendant by the averments of the bill what facts are relied on and the use to which those facts are to be put, so it is necessary for the defendant to set forth the facts on which he bases his defense and thereby to notify the defendant of the use to which he proposes to put those facts.

2 Daniel Chancery Practice, 240: "It is, however, of great importance to the pleader in preparing an answer, to bear in mind that besides answering the plaintiff's case as made by the bill, he has to state to the court upon the answer, all the circumstances of which the defendant intends to avail himself by way of defense; for it is a rule, that a defendant is bound to apprise a plaintiff, by his answer, of the nature of the case he intends to set up (and that too in a clear unambiguous manner); and that a defendant cannot avail himself of any matter in defense, which is not stated in his answer, even though it should appear in his evidence. It is to be remarked, that the right of the plaintiff to be informed by the defendant's answer, of the nature of the defense to be set up, is not confined to the points as to which the defendant intends to produce evidence; but the plaintiff has a right, even when the facts are uncontroverted, to have notice upon the record in a precise and unambiguous manner, of the nature of the conclusions intended to be drawn from them. . . . If you state upon your answer certain facts as evidence of a particular case, which you represent to be the consequence of those facts, and upon which you rest your defense, you shall not be permitted afterwards to make use of the same facts, for the purpose of establishing a different defense from that to which, by your answer, you have drawn the plaintiff's attention."

A defendant cannot rely upon a defense different from that stated in his answer. Thus, if the answer to a bill to redeem asserts a mort-

<sup>5</sup> *Holton v. Guinn* (1895) 65 Fed. 450.

gage title in the whole of the premises, it is not competent for defendants to rely on a different title, as for a moiety.<sup>9</sup>

### § 745. Qualification of General Rule.

The rule that disables a party defendant from offering proof of a specific defense not specially pleaded by him is limited to matters of affirmative defense in avoidance of the case stated in the bill. It does not apply where the matter offered in proof by the defendant controverts a statement contained in the bill, which statement is denied in the answer. If a bill makes a specific allegation, which allegation is at the basis of the equity of the suit, and the answer contains a sufficient denial of such allegation, the defendant can offer evidence at the hearing in disproof of such allegation of the bill, though his answer has not specifically set forth the facts constituting this matter of defense. It should be remembered that all that is ever necessary to make proof admissible is that the facts to which the proof is directed should be properly in issue; and it is enough that the specific allegation should be found in the bill and denied by the

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*Jenkins v. Pys* (1838) 12 Pet. 241, 9 L. ed. 1070: A bill to set aside a deed alleged that it was wholly without consideration, though a nominal consideration was recited. The answer denied the allegations of the bill. The defendant put in evidence the fact of the payment of two thousand dollars, or its equivalent, as a consideration. The court held that this proof was admissible without any allegation in the answer that such a consideration was paid. It rebutted the allegation in the bill that the deed was without consideration.

### § 746. Answer to Bill for Infringement of Patent.

In an answer to a bill for infringement of a patent, the defendant who sets up the defense that the patentee was not the original or first inventor must state the names and places of residence of those who, it is alleged, had prior knowledge of the invention. Furthermore, the answer should disclose the defendant's theory of the construction of the patent. A defect of the answer in the last respect, however, may be considered waived by a failure to except.<sup>10</sup>

### § 747. Pleading of Payment or Set-off.

The rules of equity pleading do not require the defenses of payment or set-off to be set forth in an answer according to any particular

<sup>9</sup> *Gordon v. Lewis* (1835) 2 Sumn. 143, Fed. Cas. No. 5,613.

<sup>10</sup> *Graham v. Mason* (1860) 4 Cliff. 88, Fed. Cas. No. 5,671.

form; all that is required is for the pleader to set forth the facts in a concise and intelligent manner. Thus, in a suit by a receiver to recover a stock subscription, the defendant in his answer set up payment. The facts detailed in the answer and established by proof showed that he had given the company a note, not in actual payment of his subscription, but to enable it to get credit. It was held that he was entitled to the set-off though the answer had not pleaded the claim in precisely that aspect.<sup>11</sup>

#### § 748. Pleading Conclusions of Law.

As a general rule mere conclusions of law should not be stated, as this would be contrary to the principles of good pleading. The correct method is to state the facts intended to be proved and leave the inference of law to be drawn from those facts in the argument of the case.<sup>12</sup> Yet an answer is not necessarily objectionable for setting forth conclusions of law. Matters of law that are relevant as showing the theory of the defense and that tend to show the use to be made of the facts may properly be pleaded.<sup>13</sup> The danger of course is that, by being too explicit as to the conclusions of law that he wishes to draw from the facts, the defendant may thereby preclude himself from making some other legitimate use of those same facts.

Argumentative and uncertain statements in the answer should be avoided;<sup>14</sup> and, generally speaking, the same terseness and directness of statement that is desirable in all other pleadings should characterize the answer.

#### § 749. Presenting Numerous Defenses in Answer.

More than one defense to a bill may be presented in the answer. This indeed constitutes one of the chief merits of the answer as a mode of defense. By plea the defendant can avail himself of only one defense. By answer he can avail himself of every valid defense to the suit, and if he fails to make one good, he may succeed with

<sup>11</sup> *Reversed* (but not on this point of practice) in *Bausman v. Kinnear* (C. C. A.; 1897) 79 Fed. 172, 24 C. C. A. 473.

<sup>12</sup> 2 Dan. Ch. Pr. 240.

In *Bennett v. Neale* (1811) 1 Wightw. 324, a suit for tithes, the bill stated a notice to determine the composition of the tithes. The defendant stated in his answer that he could not be affected by the notice in any way. It was held that

this was too general and equivocal to enable the defendant to take advantage of the insufficiency of the notice in point of substance. It contained no sufficient intimation that the defendant intended to rely upon that defect.

<sup>13</sup> *Farmers' Loan, etc. Co. v. Northern Pac. R. Co.* (1896) 76 Fed. 15.

<sup>14</sup> *Von Schroder v. Brittan* (1899) 98 Fed. 160.

another. As a defensive pleading, the answer fulfils the duties of a plea, or of a series of pleas either denying facts on which the plaintiff's equity, as stated in his bill, arises, or confessing such facts and avoiding them by the introduction of some new matter.<sup>15</sup>

If several defenses are presented in one answer, each should be separately stated, clearly defined, and free from evasions and unnecessary qualifications.<sup>16</sup>

### § 750. Inconsistent Defenses.

An answer must not set up two inconsistent defenses, or two defenses that are the consequence of inconsistent facts. The result of so doing is to deprive the defendant of the benefit of both and to entitle the plaintiff to a decree at the hearing, provided the equity of his bill is otherwise supported. The circumstance that an answer sets up two inconsistent defenses argues a lack of merit as to either.

Undoubtedly one of the considerations that originally led to the rejection of answers containing inconsistent defenses is found in the fact that the answer must be sworn to. This necessarily excludes inconsistent statements; for how could a defendant be permitted to attest by his oath the truth of two statements irreconcilable with each other? But an inconsistent answer is also objectionable in respect of the principle of pleading involved, and such an answer must be rejected even though the oath is waived. As a plaintiff cannot make an inconsistent case in his bill, so the defendant cannot set up inconsistent defenses.

An answer is not subject to criticism for inconsistency of the defenses where it merely presents different aspects of the same defense in different ways, or even sets up entirely different defenses. A man may put as many consistent defenses in his answer as the facts seem to justify. Furthermore, in determining the question of the consistency of an answer, reference must be had to the whole answer. The statement of qualifying circumstances found in one part of the answer does not make out an inconsistency as regards the main defense set forth in another part of the answer.<sup>17</sup>

### § 751. When Answer Inconsistent.

An answer is inconsistent where it sets up two defenses of such nature that if one is true the other must be false. Thus, in a bill to

<sup>15</sup> 2 Dan. Ch. Pr. 239.

<sup>16</sup> *Graham v. Mason* (1869) 4 Cliff. Fed. 169.

88, Fed. Cas. No. 5,671.

<sup>17</sup> *Von Schroder v. Brittan* (1899) 98

quiet title, the answer averred, first, that the defendants had acquired title through a tax sale and, secondly, that the title to the property was and always had been vested in the United States. It was held that the answer was inconsistent.<sup>18</sup>

*Savings and Trust Co. v. Bear Valley Co.* (1902) 112 Fed. 693: In their answer the defendants set up and relied on certain contracts and certificates that were, in another connection, alleged to be null and void. Afterwards in a cross bill filed by leave of the court, the defendants sought to have the same certificates and contracts annulled. It was held that the answer was inconsistent, and exceptions for insufficiency were sustained. A party is not permitted to assume inconsistent positions in the same litigation.

The rule prohibiting the putting of two or more inconsistent defenses into one answer applies whether the defenses relied on are stated conjunctively or disjunctively, cumulatively or alternatively, though the considerations that lead to the rejection of the answer are somewhat different in the two cases. The trouble in the first case is that the two defenses cannot stand together because if one is true the other must be false. In the second case, the answer is bad because a defendant who asserts that either one or the other of the two defenses is true thereby fails to assert that either one in particular is true. A party who asserts that the fact is *both* one way *and* the other asserts something that must be false in part; while he who asserts that the fact is *either* one way *or* the other does not commit himself to the truth of either statement. Such an answer is evasive and lacking in precision.<sup>19</sup>

#### § 752. Pleading One Defense in Two Ways.

In a foreclosure suit the defendant, by way of defense, may assert in his answer that the note secured by the mortgage was procured by fraud and was invalid for want of consideration. At the same time he may by cross bill ask for the affirmative relief of rescission based on the same state of facts. The defenses made respectively by such an answer and cross bill are in the nature of claims for alternative relief based on substantially the same state of facts. They are therefore not to be considered as inconsistent and incompatible defenses.<sup>20</sup>

<sup>18</sup> *Ozark Land Co. v. Leonard* (1885) 24 Fed. 660.

<sup>19</sup> *Jesus College v. Gibbs* (1835) 1 Y. & C. Exch. 445.

<sup>20</sup> *Richardson v. Lowe* (C. C. A.; 1906) 149 Fed. 633, 79 C. C. A. 317.

### § 753. Objection of Inconsistency—Surplusage.

The inconsistency of an answer may be taken advantage of by an exception to the answer.<sup>21</sup> But an inconsistent paragraph or passage in an answer can sometimes be treated as surplusage and disregarded or struck out. The court will do this, in case of a sworn answer, only when the defect resulted from a verbal inaccuracy and was unintentional.<sup>22</sup> In case the answer is not sworn the court will no doubt be more indulgent than where the answer is under oath.

### *Suggestion of Want of Parties.*

### § 754. Objection Available in Answer.

One of the defects in a suit that may be pointed out in the defendant's answer is that which arises from a want of necessary parties. If this defect is apparent on the face of the bill, a demurrer is, of course, available; and if it is not so apparent from the allegations of the bill, a plea may be used. But these remedies are not exclusive. The defendant may always take advantage of such defect by suggesting in his answer that the bill is objectionable for want of parties. When this suggestion is made in the answer, the proper step to be taken by the plaintiff is indicated in equity rule 52. It is there provided that the plaintiff shall be at liberty specially to set the cause for argument on the question of the sufficiency of the parties. This step must be taken within fourteen days after the answer is filed. In order thus to set the cause for hearing it is necessary that an entry should be made in the clerk's order-book to the effect that the cause is "set down upon the defendant's objection for want of parties."<sup>23</sup>

A cause will be heard on a suggestion for want of parties embodied in the answer where the same is set for argument by the plaintiff after filing a replication, no objection being made by the defendant on account of the irregularity.<sup>24</sup>

### § 755. Question Determined on Bill and Answer.

This hearing is had on the allegations of the bill and answer. The main object of the proceeding seems to be to give the plaintiff a timely

<sup>21</sup> *Savings & Trust Co. v. Bear Valley Irr. Co.* (1902) 112 Fed. 693.

In this instance the exception goes, partly at least, to the legal sufficiency of the defense set up by the answer; and we are thus confronted here with a real exception to the general rule that

an exception will not lie for insufficiency of the answer in law. See post, §§ 772 *et seq.*

<sup>22</sup> 2 Dan. Ch. Pr. 243.

<sup>23</sup> Equity Rule 52.

<sup>24</sup> *Lorillard v. Standard Oil Co.* (1890) 2 Fed. 902.



opportunity to amend his bill by making additional parties if it should appear that they ought to be made. The exact nature of the hearing is not defined, however. We apprehend that upon such argument, the suggestion of want of parties contained in the answer would be treated either as a demurrer or as a plea embodied in the answer. If the defect of parties thus pointed out is apparent on the face of the bill, the suggestion in the answer will be treated as a demurrer, and the bill will be dismissed (with leave to amend), as upon a demurrer for want of proper parties.<sup>25</sup>

If the defect of parties is not apparent on the face of the bill, the suggestion of want of parties in the answer will be treated as a plea embodied in the answer, and the hearing must be treated as a hearing on argument of the sufficiency of the plea. If the court finds the matter of the plea to be sufficient in law, it may enter an order sustaining the plea and ordering the bill to be dismissed for want of proper parties, subject, of course, to the right of the plaintiff to amend. If the matter of the plea is found to be insufficient an order may be entered overruling it. Again, if the court does not wish to dispose of the matter at this juncture, it can simply pretermitt it to the final hearing; and it is supposed that this course would be pursued in most

If the plaintiff fails to set a cause for argument on the question of defect for want of parties, when a suggestion of this defect is made in the answer, he prejudices himself in the manner indicated in the following provision of the equity rule: "Where the plaintiff shall not so set down his case, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill."<sup>26</sup>

#### *Scandal and Impertinence in Answer.*

#### § 756. Exceptions for Scandal or Impertinence.

After considering whether the answer is sufficient in respect of mere form, the plaintiff should examine the document to see whether it is subject to exception for impertinence or scandal; and if he

<sup>25</sup> *Harrison v. Rowan* (1819) 4 Wash. C. C. 202, Fed. Cas. No. 6,143; *Douglas v. Butler* (1881) 6 Fed. 228.

<sup>26</sup> Equity Rule 52.

wishes to take exceptions on this ground, he must file them on or before the next rule day after the answer was put in.<sup>27</sup> Failing in this he loses, in strictness, the right to except for impertinence or scandal; but as the court has inherent power to protect itself from considering impertinent and scandalous matter, the plaintiff may sometimes, by the indulgence of the court, have the benefit of such exceptions though the suggestion of scandal or impertinence is not made within the time limited by the rule. But this, of course, depends exclusively on the grace of the court. So far as his actual rights are concerned, the failure of the plaintiff to except within the proper time operates as a waiver of the objection. Furthermore, after exceptions for impertinence or scandal have been duly filed, they are considered abandoned, if the plaintiff does not proceed at once to have them acted upon.<sup>28</sup>

Exceptions to an answer for scandal and impertinence are technically waived by taking a reference for insufficiency before the exceptions for scandal and impertinence have been heard.<sup>29</sup>

**§ 757. Liberality of Practice as to Raising Objection.**

The defect of impertinence is of such nature that it concerns not so much justice as the administration of justice. It is an imposition on the court, and indulgence of it tends to clog the legal machinery. Consequently, the court may sometimes well feel inclined to favor the suppression of impertinent allegations as a matter of pure self-protection. While the court is not accustomed to take the initiative in suppressing impertinent matter, yet it certainly will not interpose technical obstacles.<sup>30</sup>

**§ 758. Form and Sufficiency of Exceptions to Answer.**

As regards the form and sufficiency of exceptions to an answer for impertinence or scandal the same rules govern as in regard to exceptions to bills based on the same ground. The exceptions must be specific and must describe the particular passages considered impertinent or scandalous.<sup>31</sup>

<sup>27</sup> Equity Rule 27.

<sup>28</sup> See Equity Rule 27.

<sup>29</sup> *Barrett v. Twin City Co.* (1901) 111 Fed. 45. But in the same case matter was ordered to be stricken out where the attention of the court was drawn to its impertinence on examining exceptions for insufficiency.

<sup>30</sup> *Wood v. Mann* (1834) 1 Summ. 598.

<sup>31</sup> Equity Rule 27.

A motion to strike parts of an answer must specify the particular portions to which exception is taken. *McGorray v. O'Connor* (C. C. A.; 1908) 31 C. C. A. 114, 87 Fed. 596.

The exception should ask that the impertinent matter may be stricken out or expunged, but if this prayer be absent the omission is of little moment. The plaintiff may always amend his exception by inserting the appropriate prayer.<sup>32</sup>

#### § 759. Exceptions Must Be Good in Entirety.

An exception for impertinence must be allowed in its entirety or not at all, and if matter covered by an exception to an answer is responsive and relevant in any aspect, the exception must be overruled.<sup>33</sup> An exception for impertinence cannot be allowed in part. But where an exception to three exhibits appeared to be sustainable as to two of them but not sustainable as to the other, the court treated the exception, though in form entire, as being substantially three separate exceptions, one to each exhibit, and permitted the two impertinent exhibits to be stricken out.<sup>34</sup>

#### § 760. Reference to Master.

According to the English practice, exceptions for impertinence were commonly referred to the master. Equity rule 27, which is based on the English practice, also contemplates a reference to the master to examine and report on such exceptions. This mode of procedure is not convenient in courts having no standing master; and accordingly we find that, in the federal courts, the judge often looks into the exceptions himself. Yet if the exceptions are referred to a master, it is all right.<sup>35</sup> In cases where the exceptions are numerous or the questions involved are tedious, the reference to the master can be adopted with much convenience to the court.<sup>36</sup>

#### § 761. What Constitutes Impertinence in Answer.

Impertinent matter in an answer may be defined as new matter that is irrelevant and that forms no sufficient ground of defense.<sup>37</sup>

Scandal in an answer is merely a form—though the most reprobated form—of impertinence. In addition to being legally impertinent, scandalous matter is also objectionable because of its tendency to damage the reputation of the person aspersed. Under the equity rules scandal and impertinence are treated as one.

<sup>32</sup> *Whittemore v. Patten* (1897) 84 Fed. 51.

<sup>33</sup> *Osgood v. Aloe Inst. Co.* (1895) 69 Fed. 291.

<sup>34</sup> *Chapman v. School Dist.* (1895) Fed. Cas. No. 2,607, Deady, 108.

<sup>35</sup> *Wood v. Mann* (1834) 1 Sumn. 578, 598.

<sup>36</sup> See *Willis v. Terry* (1899) 98 Fed. 8.

<sup>37</sup> *Barrett v. Twin City Power Co.* (1901) 111 Fed. 45.

Impertinent matter may be inserted in an answer either as matter of discovery or as matter concerning the defense. If, considered as discovery, it appears to be unresponsive to the allegations of the bill and, considered as pleading, it appears to be irrelevant to the legitimate issues of the suit, it is impertinent. In either aspect, the statement involved is unnecessary and burdensome to the record and should be stricken out as impertinent. In the oft-quoted language of Gilbert, L. C. B., impertinence is "where the records of the court are stuffed with long recitals, or with long digressions of matter of fact, which are altogether unnecessary and totally immaterial to the matter in question."<sup>38</sup> "The best rule," says Judge Kent, "to ascertain whether matter in an answer be impertinent is to see whether the subject of the allegation could be put in issue or be given in evidence between the parties." It follows that to such matters in an answer as are irrelevant to the issues made, and which raise collateral questions not proper to be put in evidence between the parties, an exception for impertinence will lie; but those matters which, save for the legal insufficiency, would be a defense to the bill, are not open to attack by such exceptions.<sup>39</sup>

### § 762. When Defensive Matter Impertinent.

A defense set up in an answer to a suit in equity in a federal court is irrelevant and will be stricken for impertinence, where it appears that such defense is not available in the federal court but only in the state court.<sup>40</sup> And, generally, any matter setting up an irrelevant, untenable, or impossible defense is impertinent.<sup>41</sup>

A paragraph in an answer is impertinent that sets up matter available only by plea in abatement.<sup>42</sup> The reason is that the answer to the merit waives the matter in abatement, and the latter thereby becomes irrelevant.<sup>43</sup>

An answer setting up matter already embodied in a plea that has been overruled (without special leave to rely on the same in the answer) is objectionable to that extent;<sup>44</sup> and no doubt an exception

<sup>38</sup> See *Harrison v. Perea* (1897) 168 U. S. 311, 42 L. ed. 473, 19 Sup. Ct. Rep. 120.

<sup>39</sup> *Pennsylvania Co. v. Bay* (1905) 138 Fed. 203, 206.

<sup>40</sup> *Ganswell Fire-Alarm Tel. Co. v. Mayor* (1887) 31 Fed. 312.

<sup>41</sup> *Langdon v. Goddard* (1843) Fed. Cas. No. 8,061, 3 Story 12.

<sup>42</sup> *Chapman v. School Dist.* (1865) Dundy 108, Fed. Cas. No. 2,607.

<sup>43</sup> In *Wood v. Mann* (1834) 1 Sumn. 378, the point involved was that a traverse of the jurisdictional fact of citizenship is unavailing in the answer. On this particular point the law is now different under the Act of March 3, 1875; but the principle still holds as regards other matters in abatement that are not available by answer.

<sup>44</sup> *Pentlargo v. Pentlargo* (1884) 22 Fed. 412.

to such portion of the answer, going on the idea of the impertinence of that matter, could be sustained if the exception were timely taken.<sup>45</sup>

Averments of an answer showing an affirmative right of action on the part of the defendant such as is available only by cross bill, may be stricken from the answer for impertinence.<sup>46</sup> The rule applies whether the matter of the cross demand is of a legal or an equitable nature.<sup>47</sup>

### § 763. Argumentative Statements.

A paragraph in an answer containing merely an argument as to the law applicable to a case will be stricken out; and the fact that the paragraph also contains a denial of an allegation of fact in the bill will not save it, where other language shows that the denial goes to the legal conclusion only.<sup>48</sup> Arguments of fact are also impertinent.<sup>49</sup>

### § 764. Superfluous Allegations.

A paragraph in an answer which merely rehearses facts stated in the bill and which supplies no new matter in defense thereof or in response thereto, is impertinent as an affirmative defense; and, if otherwise not material as an admission, will be stricken out.<sup>50</sup> A paragraph in an answer stating facts which may well be proved under other averments in the answer may likewise be expunged.<sup>51</sup>

Matter that may be impertinent considered in itself alone may yet be made relevant by other averments in the answer. If a statement supplies proper matter of inducement to other material averments it is good.<sup>52</sup>

### § 765. Allegation of Non-issuable Matters.

An answer cannot make an issue by denying averments not made in the bill, nor enlarge the scope and meaning of the averments of the bill by expanding the denials of the answer beyond the allegations

<sup>45</sup> See *American Loan etc. Co. v. East & West B. Co.* (1889) 40 Fed. 385.

<sup>46</sup> *Armstrong v. Chemical National Bank* (1889) 37 Fed. 466; *Chapman v. School Dist.* (1885) Dedy 108, Fed. Cas. No. 2,607.

<sup>47</sup> *Whittenore v. Patten* (1897) 84 Fed. 51.

<sup>48</sup> *Florida Mortgage etc. Co. v. Finlayson* (1896) 74 Fed. 671.

<sup>49</sup> *Florida Mortgage etc. Co. v. Finlayson* (1896) 74 Fed. 671.

<sup>50</sup> *Florida Mortgage etc. Co. v. Finlayson* (1896) 74 Fed. 671.

<sup>51</sup> *Armstrong v. Chemical Nat. Bank* (1889) 37 Fed. 466.

<sup>52</sup> *Chapman v. School Dist.* (1885) Dedy 108, Fed. Cas. No. 2,607.

of the bill. Hence an exception will lie for impertinence to matter in an answer which, if given any effect at all, would make an entirely new issue. Matter will be stricken as impertinent which, when considered in the light of an averment denying material facts stated in the bill, is clearly irrelevant and which, when considered in the light of new matter setting up an affirmative defense, is manifestly lacking in clearness and precision.<sup>53</sup>

### § 766. Insufficiency Distinguished from Impertinence.

Evasive and insufficient answers cannot be stricken out for impertinence, where they are at all responsive to the bill. The plaintiff should except for the insufficiency.<sup>54</sup> That an answer is a sham, meaning thereby that it is good in form but false in fact, and that it is not pleaded in good faith, is no ground of exception for impertinence.<sup>55</sup>

### § 767. Responsive Matter Not Impertinent.

Matter responsive to any allegation in the bill will not be expunged for impertinence, though it be really irrelevant to the issues in the suit. A plaintiff who first offends against good pleading by incorporating irrelevant charges in his bill cannot complain when he finds that his opponent takes notice of them.<sup>56</sup> The courts are especially lenient to respondents who, in answering charges reflecting on their personal character, go into details in order to relieve themselves of the imputations made by the bill.

*Comstock v. Herrou* (1891) 45 Fed. 660: In a bill filed against executors and trustees under a will to obtain a construction of the will and to compel the making of certain investments, there were broad allegations that the defendants had, in violation of their trust, delayed, neglected, and refused to make investments required by the will. The answer of the defendants stated that their entire conduct in the matter was known to the plaintiff and approved by her, and that they were proceeding as rapidly as possible to convert the estate into money or other productive property. Exceptions were taken to the answer on the ground that parts of it were not responsive, but the court said: "I do not think that the respondents, when charged with dereliction of duty and violation of their trust, ought to be limited to a simple denial, and to be precluded from setting up that not only was no objection made by the complainant,

<sup>53</sup> *Osgood v. Aloe Instrument Co.* (1895) 69 Fed. 291.

<sup>54</sup> *Chapman v. School Dist.* (1865) 8,578.  
Deady, 108, Fed. Cas. No. 2,607.

<sup>55</sup> *Stokes v. Farnsworth* (1900) 99 Fed. 836.

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<sup>56</sup> *Lonsdale v. Portland* (1861) Deady 1, 1 Oregon 381, Fed. Cas. No.

but that she approved their entire conduct in this matter. While it may be true that that may not affect the final decree in this case, I think the trustees are entitled to relieve themselves from the imputations which are at least implied by the averments of the bill."<sup>57</sup>

### § 768. Impertinence of Exhibit.

An exception for impertinence of an exhibit filed with the answer will not be sustained where the averment to which the exhibit refers is permitted to remain in the answer. But if the averment, to which the exhibit itself is attached, is alone sufficient and the exhibit only adds to the bulk of the answer, the exception to the exhibit will be allowed. Where the averment to which the exhibit refers is stricken for impertinence, the exhibit will also be stricken as a matter of course.<sup>58</sup>

### § 769. Attitude of Courts in Dealing with Exceptions for Impertinence.

In passing on exceptions for mere impertinence the court is slow to order matter struck out unless it is manifestly objectionable; for, if it should afterwards appear that the matter so stricken is relevant, the error might be past curing, while, if it stays in, no great harm is done, and the bad pleading may be punished by the proper taxation of costs. Accordingly in considering exceptions to an answer for impertinence, all substantial doubts are to be resolved in favor of the pertinency of the matter. Nothing should be expunged from an answer which, if proved, could operate on the judgment of the court in deciding any issue, either as regards the propriety of granting relief, the extent of the relief, or even the discretionary matter of costs.<sup>59</sup>

1. *Miller v. Buchanan* (1880) 5 Fed. 366: Where a bill alleged that the decision in a certain suit was made after full consideration, an averment in the answer was held not to be impertinent which tended to show that, on the contrary, the court decided the cause in question hastily without reading all the proofs or perusing the briefs of counsel.

2. *Griencold v. Hill* (1825) Fed. Cas. No. 5,835, 1 Paine 390: In a bill to revive a partnership on the ground that the condition on which the same had been cancelled was unfulfilled, it was alleged that the partnership had been formed at the particular desire and solicitation of the defendant. The defendant stated in his answer that one reason why he became desirous of cancelling it was that he had become entirely convinced that any connection in business

<sup>57</sup> Reversed, but on another point. <sup>58</sup> *Von Schroder v. Brittan* (1899) 98 (1893) 5 C. C. A. 266, 55 Fed. 803. Fed. 169.

<sup>59</sup> *Chapman v. School Dist.* (1865) Dundy 109, Fed. Cas. No. 2,607.

with the plaintiff was highly inexpedient and unsafe. This was held to be pertinent.

Where language tends to scandal, and the answer is excepted to on that ground, the court is perhaps more strict.<sup>60</sup>

#### § 770. Allegations Addressed to Judicial Discretion.

Where the court has a discretion as regards the extent of the relief to be granted, should the plaintiff make out his case, the defendant may in his answer set forth any facts tending to move the discretion of the court in his favor, and such matter will not be stricken for impertinence. Thus, in a suit to enforce literal performance of a contract involving a forfeiture the defendant may show that the contract was a very hard one and that he had endeavored in good faith to carry it out.<sup>61</sup>

#### § 771. Order to Recast Defective Answer.

In a case where the answer contains objectionable and irrelevant matter that cannot well be stricken out on exceptions without leaving the answer disjointed and unsatisfactory as a pleading, the court may sustain the exceptions *pro forma* and order the defendant to recast his answer.<sup>62</sup>

### *Exceptions to Sufficiency of Answer.*

#### § 772. Function of Exceptions to Sufficiency.

The next thing about the answer to be considered by the plaintiff is the question of the sufficiency of the answer as regards discovery. Are the statements of the answer fully responsive to the allegations of the bill? If not, the answer is insufficient. It is to be impressed on the mind that exceptions to the sufficiency of an answer, or what is the same thing, exceptions for insufficiency, are addressed solely to the matter of the sufficiency of the disclosures made in the answer in its aspect as a vehicle of discovery. Are the responses sufficiently full and precise, and does the defendant give to the plaintiff all the discovery to which the latter is entitled? No other question or defect can be considered on an exception for insufficiency than that just

<sup>60</sup> *Griswold v. Hill* (1825) Fed. Cas. No. 5,835, 1 Paine 390.

<sup>62</sup> *Dr. Miles Medical Co. v. Snellenburg* (1907) 152 Fed. 661.

<sup>61</sup> *Barrett v. Twin City Power Co.* (1901) 111 Fed. 45.



stated. Considered as a pleading and as a statement of the defense on which the defendant intends to rely, the answer may be seen to be transparently worthless and insufficient, yet this is a matter that cannot be brought before the court on an exception for insufficiency. An exception to the answer for insufficiency, raises a question not of the sufficiency of the answer in point of law, but of the sufficiency of the discovery given by the answer. If the averments of the bill appear to have been fully answered, exceptions for insufficiency are not maintainable.<sup>63</sup>

Moreover, as exceptions for insufficiency go only to the sufficiency of the answer as regards discovery, and not to the sufficiency of the answer as a pleading, so these exceptions supply the only means known to the law whereby to test the sufficiency of the answer as regards discovery. Equity practice recognizes no substitute for these exceptions. Neither a demurrer<sup>64</sup> nor a replication<sup>65</sup> can be made to serve the function of exceptions for insufficiency.

Exceptions for insufficiency are quite naturally resorted to where the plaintiff desires to draw out fuller and more satisfactory answers to specific interrogatories, and such exceptions certainly supply a very satisfactory means of probing the defendant and of compelling him to make full answers to interrogatories; but these exceptions are also used to compel him to respond fully to the allegations of the bill, even when no specific interrogatories are put. As we have already seen, the defendant is bound to answer all the allegations of the bill as well as all the special interrogatories, and in either case his duty is enforced by the same process. The theory on which equity pleading is based, so far as regards the bill and answer, is that by means of the answer the plaintiff secures admissions that may limit the field of controversy and enable him to dispense with other proof. Therefore, if a defendant fails to respond to a material allegation of the bill the plaintiff can except to the answer, for haply if the defendant had answered that allegation, he might have admitted its truth and thus the plaintiff would have been relieved of the necessity of proving it.

<sup>63</sup> *Pennsylvania Co. v. Bay* (1905) 138 Fed. 203; *Walker v. Jack* (C. C. A.; C. A.; 1905) 135 Fed. 693, 48 C. C. A. 1898) 88 Fed. 576, 31 C. C. A. 482; *Ross v. Gibson* (1831) Fed. Cas. No. 12,074.

<sup>64</sup> *Chicago etc. R. Co. v. McComb* (1890) 2 Fed. 18.

<sup>65</sup> *Robinson v. Am. Car etc. Co.* (C. C. A.; 1905) 135 Fed. 693, 48 C. C. A. 1898.

### § 773. When Exception Sustainable.

Before an exception for insufficiency can be sustained, it must appear that the answer has failed to respond to some material allegation of the bill or to some pertinent question based on a material allegation. Exceptions do not lie for failure to respond to immaterial and impertinent allegations or to questions founded on such allegations. "It is not a sufficient foundation for an exception that a fact charged in a bill is not answered, unless the fact is material, and might contribute to support the equity of the case of the complainant, and induce the court to give the relief sought by the bill."<sup>66</sup>

*Peters v. Tonopah Min. Co.* (1903) 120 Fed. 587: In a bill to determine rights to a mining claim, it was alleged that a "notice" of location was duly recorded by the plaintiff at a certain time and place. It was held that the answer was not subject to exception for failure to admit or deny this statement, since, under the law applicable to mining claims, a notice of location is not required to be filed, and hence the filing of it is without any legal effect.

A question as to the merits cannot properly be decided on exceptions for insufficiency, and an exception is not well taken the decision of which would involve a decision on the merits.<sup>67</sup>

### § 774. Defensive Matter Not Subject to Exception.

An exception for insufficiency will not lie to new matter set up in the answer by way of affirmative defense. A new substantive defense not responsive to the inquiries of the bill is always relevant, always material, and never "insufficient."<sup>68</sup>

An answer that sets up matter appropriate for a negative plea will be upheld on exceptions for insufficiency where the answer meets and denies the equities of the bill. In the case referred to below, an answer to a bill filed to determine the validity of a land claim denied the validity of the entry under which plaintiff claimed, averred that it had been cancelled, and further set up a later entry by the defendant. Exceptions to the answer were overruled.<sup>69</sup> If an answer to a bill to recover on an alleged contract of insurance substantially denies

<sup>66</sup> *Hardeman v. Harris* (1849) 7 How. 726, 729, 12 L. ed. 889, 890. *Wells Rustless Iron Co.* (1890) 43 Fed. 391; *Adams v. Bridgewater Co.* (1881)

<sup>67</sup> *Barrett v. Twin City Power Co.* 6 Fed. 179. (1901) 111 Fed. 45.

<sup>68</sup> *Stimson Land Co. v. Rawson* (1894) 62 Fed. 426. *Greene v. Aurora R. Co.* (1906) 158 Fed. 209; *Bower Barff etc. Co. v.*

the making of the contract set forth in the bill, it is not subject to exception on the ground that the answer does not "explicitly" admit or deny that there was a contract as "alleged and set out" in the bill.<sup>70</sup>

### § 775. When Exceptions to Be Filed.

Unless the court is pleased to allow a longer time for good cause shown, exceptions for insufficiency must be filed on or before the next rule day succeeding that on which the answer is filed.<sup>71</sup> This gives the plaintiff substantially the same time within which to except for insufficiency that he has to except for impertinence.<sup>72</sup> But it is not necessary, where both sorts of exceptions are filed, that they should be filed, or that they should be pending, at the same time. If a plaintiff excepts for impertinence, he can no doubt wait until those exceptions are disposed of before he excepts for insufficiency, for this conduces to the orderly progress of the cause.<sup>73</sup> Certainly, if the time limited by equity rule 61 for filing exceptions for insufficiency expires while exceptions for impertinence are pending, this would be a good reason for the court to extend the time for excepting for insufficiency.

The court will not permit an extension of time for the filing of exceptions to an answer, where it appears that needless delay might thereupon ensue and that the cause of justice will be as well served by requiring the plaintiff to file a replication and prepare for the hearing.<sup>74</sup>

Exceptions for insufficiency cannot be filed after the plaintiff has taken any step that operates as a judicial admission that the answer is sufficient. The putting in of a replication is held to have this effect. "No insufficient answer can be taken hold of after replication put in, because it is admitted sufficient by the replication."<sup>75</sup>

If exceptions are filed, without leave of court, after the time for filing such exceptions has passed, the proper way to get rid of those exceptions is by motion to strike them from the file.<sup>76</sup>

<sup>70</sup> *Phenix Ins. Co. v. Schultz* (1897) 80 Fed. 337, 25 O. C. A. 443 (1896) 77 Fed. 375.

<sup>71</sup> Equity Rule 61.

<sup>72</sup> Equity Rule 27.

<sup>73</sup> See *Patriotic Bank v. Washington Bank* (1839) Fed. Cas. No. 10,806, 5 Cranch C. C. 609.

<sup>74</sup> *American Loan etc. Co. v. East & West R. Co.* (1889) 40 Fed. 384.

<sup>75</sup> No. 62, Lord Bacon's Ordinances.

<sup>76</sup> *Way v. Hygienic etc. Co.* (1906) 144 Fed. 370.

### § 776. Waiver of Right to Except.

By equity rule 61 the failure of the plaintiff to file exceptions for insufficiency within the time limited by that rule operates as an admission on the part of the plaintiff that the answer is sufficient and the answer is to be so deemed. Exceptions must be considered abandoned where the party taking the exceptions neither sets them down for hearing nor moves for an order of reference to the master.<sup>77</sup>

If the plaintiff for any reason wishes to withdraw his exceptions to the answer, he may do so.<sup>78</sup>

### § 777. Form of Exceptions.

It is desirable that the exceptions to the sufficiency of an answer should be quite full and explicit. They must not be too general.<sup>79</sup> It has been said that the exception should state the charges in the bill, the interrogatories applicable thereto (where the exception is to the answer to an interrogatory) and the terms of the answer verbatim, so that the court can see from an inspection of the exception whether the answer is sufficient.<sup>80</sup> But this strictness is not always observed. The exceptions should certainly state the part or parts of the bill that the plaintiff alleges have not been fully answered; but if they are sufficiently clear to be intelligible and are precise enough to point to the defect which exists, if any, it is enough.<sup>81</sup>

The exceptions should conclude with an informal prayer that the defendant may be required to put in a further answer. They should, of course, be in writing.<sup>82</sup>

### § 778. Liberality of Practice—Judicial Discretion.

The rules in regard to the form and character of exceptions to the sufficiency of the answer are not enforced with technical strictness, and departures that do not materially affect their efficacy are disre-

<sup>77</sup> *American Loan etc. Co. v. East & West R. Co.* (1889) 50 Fed. 384.

<sup>78</sup> *Penn. v. Butler* (1901) Fed. Cas. No. 10,931, Wall. (U. S.) 4.

<sup>79</sup> "No reference to be made of the insufficiency of an answer without showing of some particular point of the defect, and not upon surmise of the insufficiency in general." No. 52, Lord Bacon's Ordinances.

<sup>80</sup> *Brooks v. Byam* (1840) 1 Story 296, Fed. Cas. No. 1,947; *Bower Barff*

*Rustless Iron Co. v. Wells Rustless Iron Co.* (1890) 43 Fed. 391; *Fuller v. Knapp* (1885) 24 Fed. 100.

An exception which fails to state the charges in the bill to which the answer is addressed and which is alleged to be insufficiently answered, is bad. *Schultz v. Phenix Ins. Co.* (1896) 77 Fed. 375.

<sup>81</sup> See *Whittemore v. Patten* (1897) 84 Fed. 51.

<sup>82</sup> *Crouch v. Kerr* (1899) 28 Fed. 556.

garded. If the prayer to an exception happens to be omitted by inadvertence, the court will permit it to be amended on the spot.<sup>82</sup> In dealing with the formalities in regard to the taking of exceptions to the answer, and even in dealing with matters pertaining to the substance of the exceptions, the court has a substantial discretion which is exercised in furtherance of the administration of justice.

*Reed v. Conseques* (1822) 4 Wash. C. C. 335, Fed. Cas. No. 11,607: An answer coming from a remote country was defective in respect to the form of the verification, and an order had to be entered that it be retaken. Counsel for plaintiff intimated that the answer was also subject to exceptions for insufficiency, whereupon the court of its own motion required that he should within ten days file exceptions to this answer; and the court observed that if the new answer should be free from the defects thus pointed out, no other exceptions would be entertained.

#### § 779. Exceptions Set for Hearing before Court.

By the practice prevailing in the English chancery at the time of the adoption of our rules, but not now followed there, exceptions for the insufficiency of an answer were referred to a master.<sup>84</sup> This practice is not commonly followed in the federal courts, for equity rule 63 plainly contemplates that exceptions for insufficiency shall be set down for hearing before the court, or before a judge of the court, at the rule day next succeeding that at which the exceptions were filed.<sup>85</sup>

#### § 780. When Exceptions Referred to Master.

The court undoubtedly may, if it sees fit, refer the exceptions to a master; and this has been done where it appeared that the pleadings were lengthy and the exceptions numerous. Such a reference may be ordered though the questions involved are questions of law.<sup>86</sup>

<sup>82</sup> *Whittamore v. Patten* (1897) 84 Fed. 51.

<sup>84</sup> No. 12, Eng. Orders in Chan. (1828, 1831).

<sup>85</sup> In *La Vega v. Lapsley* (1871) 1 Woods 428, Fed. Cas. No. 8,123, the question was whether, under equity rule 63, exceptions for the insufficiency of an answer must in the first instance be set down for hearing before a judge of the court, or whether they might be referred to the master at once and on some other day than a rule day. It was held that the exceptions must be set down for

hearing before the court, and that by at once referring them to the master, the plaintiff waives them. However, in this case, it appeared that the court had acted on the report of the master sustaining some of the exceptions, and the defendant himself had acquiesced by filing an additional answer. Accordingly, it was ruled that the defect was cured and that the case was ready for a replication, which was then permitted.

<sup>86</sup> *John D. Park & Sons Co. v. Bruen* (1906) 147 Fed. 684.

**§ 781. Effect of Overruling Exceptions.**

Where exceptions to the sufficiency of an answer are overruled and the answer is adjudged sufficient, the plaintiff has a right to put in a replication and proceed to a trial on the merits, and neither the circuit court nor the supreme court has the power to deprive him of this right.<sup>87</sup>

**§ 782. Procedure When Exceptions Sustained.**

An answer being adjudged insufficient, the defendant will be ordered to answer further, and to put in a full and complete answer, and upon his refusal or failure to do so the bill will be ordered to be taken as confessed as to the matter concerning which exception was taken;<sup>88</sup> or, under equity rule 64, the plaintiff can have the defendant attached as for contempt and held in custody until a sufficient answer is filed.

Exceptions to an answer being sustained a second time on substantially the same ground as before, the court will impose costs, to be followed by harsher measures, such as contempt proceedings, if the defendant persists in his refusal to answer fully.<sup>89</sup>

**§ 783. Defendant's Further Answer.**

A defendant who is ruled to answer further on one exception referred to a master, need not answer until other exceptions taken at the same time by the plaintiff to the sufficiency of the answer are determined.

*Willis v. Terry* (1899) 98 Fed. 8: An answer being filed the plaintiff excepted for insufficiency. The exceptions were referred to the master, one being sustained, the others overruled. The defendant took no exception to the ruling of the master, but the plaintiff did. The defendant was of course bound to answer the matter as to which the exception for insufficiency was sustained, but it was held that he need not answer to this until the exceptions of the plaintiff to the ruling of the master had been disposed of; for, haply, if those exceptions were overruled by the court, the defendant would also be required to answer further to other matters, and there was no propriety in requiring him to answer piecemeal.

<sup>87</sup> *In re Sanford Fork & Tool Co.* 416; *Hale v. Continental Ins. Co.* (1884) (1895) 160 U. S. 247, 258, 40 L. ed. 20 Fed. 344.  
414, 417.

<sup>88</sup> *In re Sanford Fork & Tool Co.* (1846) 1 Woodb. & M. 244, Fed. Cas. (1895) 160 U. S. 247, 256, 40 L. ed. 414, No. 7,859.

<sup>89</sup> *Kittredge v. Claremont Bank*

*Exceptions to Unsworn Answer.***§ 784. Effect of Waiving Oath.**

Throughout the preceding discussion we have assumed that the answer to be dealt with is the ordinary sworn answer. We are now to consider the extent to which the practice above stated may require modification when the answer under oath is waived in the bill in accordance with the equity rule.<sup>90</sup> The question now to be answered is this: Is an answer subject to exceptions for insufficiency where the oath is waived? Or, put in another way, is the duty of the defendant to make a full and complete answer to every material allegation and interrogatory in any wise affected by the circumstance that the oath is waived? One's first impression on considering this problem will probably be that, in point of principle, an unsworn answer cannot be anything more than a mere pleading. Waiving the oath would seem necessarily to have the effect of taking out of the case everything that is at all dependent upon, or connected with, the principle of discovery. In this view an unsworn answer is not subject to exceptions for insufficiency. Even though an unsworn answer contains only a general traverse, the plaintiff has no power to force the defendant into a fuller and more satisfactory answer; for having waived the oath, he has waived the right to compel the making of admissions favorable to his own cause. Equity, it may be said, has always enforced discovery in behalf of the plaintiff, but this was only upon the condition that the defendant's answer should be evidence in his favor as well as in the plaintiff's favor, and now if the answer is to be deprived of its evidentiary value in favor of the defendant, the defendant should no longer be compelled to make any admissions at all. This view is reflected in the equity practice of several of the state courts of chancery.<sup>91</sup>

**§ 785. Practice in Federal Courts as Affected by Equity Rule.**

The objection to this line of reasoning, so far as the federal courts are concerned, is that the equity rule authorizing the plaintiff to

<sup>90</sup> Equity Rule 41, as amended at December Term, 1871, 13 Wall. xl.; 20 L. ed. 914. Chamberlin (1845) 11 Paige 543; Carpenter v. Benson (1847) 4 Sandf. Ch. 496; Harrington v. Harrington (1886)

<sup>91</sup> Goodwin v. Bishop (1893) 145 Ill. 421, 34 N. E. 47; Ward v. Peck (1873) 114 Mass. 121; Badger v. McNamara (1877) 123 Mass. 117, 120; Morris v. Merriis (1858) 5 Mich. 171; Fish v. Miller (1834) 5 Paige 26; McCormick v. Chamberlin (1845) 11 Paige 543; Carpenter v. Benson (1847) 4 Sandf. Ch. 496; Harrington v. Harrington (1886) 15 R. I. 341, 5 Atl. 502; Starkweather v. Williams (1898) 21 R. I. 55, 41 Atl. 1,003; Sheppard v. Akers (1873) 1 Tenn. Ch. 326.

The New York decisions are based upon an equity rule which expressly pro-

waive the defendant's oath, in stating the effect of an unsworn answer, merely says that it shall not be evidence in the defendant's favor. This in a measure defines the results of waiving the oath and by implication negatives the idea that waiving the oath shall have the further effect of excusing the defendant from answering fully. Moreover there is nothing in this rule to lend countenance to the idea that in authorizing the plaintiff to waive the defendant's oath, the supreme court meant to repeal the provision of equity rule 40 which declares that the defendant must give discovery on any and every statement of the bill, though no particular interrogatories based on such statement are attached to the bill.<sup>93</sup>

### § 786. Other Considerations.

But even aside from the wording of the equity rule, which would seem to be conclusive, there are other considerations militating against the view noted above as prevailing in the courts of equity of some of the states. That an unsworn answer is a mere pleading is certainly in a measure true,<sup>94</sup> yet it by no means follows that, considered as a mere pleading, such an answer may not be subject to exceptions for insufficiency. What should now go into an answer considered as a mere pleading may well be very different from what would have been necessary to put in if there had never been anything in the answer but matter of pleading. In the development of the answer as a pleading, the principle of discovery has exerted an influence that must constantly be taken into account. We have seen in another connection that a general traverse was never adequate in practice,<sup>95</sup> even considering the answer as a mere pleading, and there is no reason to suppose that waiving the oath has changed the law on this point. The view that a defendant need not answer fully to all the allegations of the bill, when the oath is waived, presupposes a theoretical separation of the two different elements of the answer which in fact has not been effected. Abstract theory must here yield to considerations based on history and actual practice.

One of the strongest arguments in favor of compelling defendants to answer fully, though the oath is waived, is found in the con-

vides that an answer shall not be subject to exceptions where the oath is waived. See Bates Federal Equity Procedure, 131.

<sup>93</sup> This is the effect of the amendment of December 1860 to Equity Rule 40.

<sup>94</sup> Waiving the oath of a defendant re-

duces the answer to a pleading. *Tillinghast v. Chace* (1903) 121 Fed. 435. See *Union Bank v. Geary* (1831) 5 Pet. 99, 112, 8 L. ed. 60; *Patterson v. Gaines* (1845) 6 How. 588, 12 L. ed. 568; *Huntington v. Saunders* (1867) 120 U. S. 20, 30 L. ed. 582.

<sup>95</sup> See ante, § 741.



sideration of practical convenience. By forcing the defendant into detailed statements the field of inquiry into the facts is often considerably narrowed and the scope of the necessary proof much circumscribed. This is very desirable in the prosecution of suits in the federal courts of equity, for the constant tendency of the practice in these courts has been to encumber the record with vast piles of proof about irrelevant as well as relevant matters. In this state of affairs, the courts cannot afford to overlook any legitimate means of narrowing the scope of the proof. The rule requiring the defendant to make full disclosures is perhaps not a very efficacious means to this end; but as it has some tendency in this direction it should not be abrogated.

### § 787. Prevailing Doctrine in Federal Courts.

In conformity with the view presented above it is generally held in the federal courts that a defendant must answer fully every material allegation of the bill, though the oath is waived,<sup>95</sup> though authority is not wanting to the contrary.<sup>96</sup>

In the later decisions a distinction is drawn between the allegations of the bill and interrogatories attached to the bill. If an answer under oath is waived and the defendant puts in an answer that fully responds to all the material allegations of the bill, he may ignore and refuse to answer interrogatories filed with the bill. The waiver of the oath deprives the plaintiff of the right to insist on discovery as incident to the answering of the interrogatories.<sup>97</sup> This proposition seems to the writer to embody a fair, though not a necessary, distinction, and it may be considered good law. Waiving the oath does not relieve the defendant from responding fully to the allegations of the bill; but interrogatories are not allegations at all. "An interrogatory propounds a question, and neither at common law nor in equity can an issue be framed upon a mere question." "Interrogatories cannot be propounded to be answered otherwise than upon oath."<sup>98</sup> However, there are a number of cases from the federal

<sup>95</sup> *John D. Park & Son Co. v. Bruen* (1906) 147 Fed. 884; *Victor G. Bloede v. Carter* (1906) 148 Fed. 127; *National Hollow Brake Co. v. Interchangeable Brake Beam Co.* (1897) 83 Fed. 26; *Whittamore v. Patten* (1897) 81 Fed. 527; *Uhlmann v. Brewing Co.* (1899) 41 Fed. 369; *Gamewell Fire-Alarm Tel. Co. v. Mayor etc.* (1897) 31 Fed. 312; *Colgate v. Compagnie Française* (1885) 23 Fed. 82.

<sup>96</sup> *Tillinghast v. Chace* (1903) 121 Fed. 435; *U. S. v. McLaughlin* (1885) 24 Fed. 623. Compare *Field v. Hastings* (1895) 65 Fed. 279.

<sup>97</sup> *Victor G. Bloede Co. v. Carter* (1906) 148 Fed. 127; *John D. Park & Sons Co. v. Bruen* (1906) 147 Fed. 884; *McFarland v. State Sav. Bank* (1904) 132 Fed. 39.

<sup>98</sup> *Tillinghast v. Chace* (1903) 121 Fed. 435.

courts, holding that interrogatories must be answered where the oath is waived with the same particularity as if the answer were under oath;<sup>99</sup> but these are not the latest decisions.

<sup>99</sup> *Uhlmann v. Arnholt etc. Co.* (1890) 41 Fed. 389; *Slater v. Banwell* (1892) 50 Fed. 150; *Playford v. Lockard* (1895) 65 Fed. 870. as exhibits to the bill. It was held that exceptions for insufficiency would lie for failure to answer such question. "This cause being against a corporation only,

In *National etc. Brake Beam Co. v. Interchangeable Brake Beam Co.* (1897) 83 Fed. 26, the plaintiff sought an injunction against the infringement of a patent and an accounting for profits. The oath was waived, but a specific interrogatory was put inquiring whether or not the defendant had manufactured and sold certain brake-beams like those filed an answer under oath, even if not waived by the bill, could not have been required. Corporations answer under the sanction and solemnity of their seals only; but, whether defendants answer under oath or under corporate seals, when oaths are waived they are required to answer fully on every material issue."

## CHAPTER XVIII.

### THE REPLICATION.

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#### *Issue Made by Replication.*

### § 788. Replication Necessary to Put Cause at Issue.

Issue upon the answer is made by the filing of a replication thereto by the plaintiff. A replication is required in every case where the answer is not excepted to, or where it is excepted to but is adjudged sufficient, and the plaintiff does not wish to set the cause for hearing on bill and answer. The replication is a formal pleading merely, but

the formality is one required by the ancient practice of the court of chancery, and it has not been dispensed with in the federal courts of equity. A state statute abolishing replications in equity has no effect upon the practice of the federal courts.<sup>1</sup>

#### § 789. General and Special Replications.

The replication to the answer is borrowed from the common-law practice, and originally replications in equity, as at law, were either general or special. The general replication controverts the answer in general terms and operates to make a general issue on the truth of the facts stated in the answer. The special replication sets up new matter by way of avoidance of the facts stated in the answer.

#### § 790. Abolition of Special Replications.

The special replication has long been disused in equity owing to the fact that every attempt to carry the special pleadings further than the answer was found to be productive of confusion. The engrafting of a series of common-law pleadings on two basal pleadings (the bill and the answer) that are drawn on principles very different from those in accordance with which pleadings at law are drawn evidently did not have a very happy result.<sup>2</sup> Equity rule 45 expressly provides that no special replication to any answer shall be filed,<sup>3</sup> and this rule conforms to the practice that had been previously adopted in the English chancery, and in a measure by the supreme court itself.<sup>4</sup>

The abolition of special replications does not abrogate or in any way modify the fundamental principle of pleading embodied in the rule that relief cannot be granted except on facts duly and properly pleaded in the record. The only consequence of doing away with the special replication therefore is that in every case where, under the rules of pleading formerly prevailing, a special replication would have been necessary in order to enable the plaintiff to avail himself of new matter in avoidance of the defense set forth in the answer, he must now amend his bill.

<sup>1</sup> *Hill v. Hite* (C. C. A.; 1898) 29 C. A. 549, 85 Fed. 268.

<sup>2</sup> *Dan. Ch. Pr. 388*; *Langdell, Eq. Pl. § 87*.

<sup>3</sup> *Mason v. Hartford etc. R. Co.* (1882) 10 Fed. 334; *Blue Ridge etc. Co. v. Floyd-Jones* (1886) 26 Fed. 817.

<sup>4</sup> *Dan. Ch. Pr. 388*. Prior to the adoption of the existing equity rule 45, a special replication could be put in only upon leave of the court. *Vattier v. Hinde* (1833) 7 Pet. 252, 8 L. ed. 675.

### § 791. Amended Bill Setting Up Matter of Special Replication.

In such an amendment the plaintiff adds a statement to the effect that the defendant relies on the particular defense, and a further statement that the defense is rendered ineffectual by the matter in avoidance which the plaintiff thereupon fully sets out. Of course if the plaintiff, at the time of the filing of the bill, is apprised of the fact that the defendant will probably rely on a particular defense that will require new matter to be set up in avoidance, it is better for the plaintiff to anticipate the defense, in the narrative or stating part of his bill, and there to set out the necessary matter in avoidance.<sup>5</sup> But if, as often happens, the plaintiff first discovers from the answer that he must rely on new matter, it thereupon becomes necessary for him to apply to the court for leave to amend the bill.<sup>6</sup> Such an application will be granted with or without the payment of costs, as the court in its discretion may direct.<sup>7</sup>

If the defendant's special defense has not been anticipated in the bill and no amendment is made, the plaintiff cannot have the benefit of new matter in avoidance of the answer, no issue being made on such new matter. The general replication will not suffice.<sup>8</sup> It results that an amendment to the bill is necessary in such cases.

*Piatt v. Vattier* (1835) 9 Pet. 406, 9 L. ed. 173: To a bill to enforce a conveyance of the legal title to land the defendant set up the statute of limitations of Ohio as a bar. The plaintiff relied on an exception to the statute in regard to persons absent from the state. But the bill had not anticipated this defense, and hence facts were not stated in the bill to bring the plaintiff within the exception. No amendment was made to the bill after answer, and the plaintiff merely filed the general replication. It was held that the plaintiff could not have the benefit of the exception in the statute. Said Story, J.: "It is said that there is complete proof in the cause, to establish such non-residence and absence. But the difficulty is, that the non-residence and absence are not charged in the bill, and of course are not denied or put in issue by the answer: and unless they are so put in issue, the court can take no notice of the proofs: for the proofs to be admissible must be founded upon some allegations in the bill and answer. . . . If the statute of limitations is relied on as a bar, the plaintiff, if he would avoid it by any exception in the statute, must explicitly allege it in his bill, or specially reply it; or, what is the modern practice, amend his bill, if it contains no suitable allegation to meet the bar."

<sup>5</sup> Equity Rule 21.

<sup>7</sup> Equity Rule 45.

<sup>6</sup> *Miller v. McIntyre* (1832) 6 Pet. 61, 8 L. ed. 320; *Mason v. Hartford etc. R. Co.* (1882) 10 Fed. 334; *Dupont v. Mussey* (1891) 4 Wash. C. C. 123, Fed. Cas. No. 4,185.

<sup>8</sup> *Hill v. Hite* (C. C. A.; 1898) 35 Fed. 268, 29 C. C. A. 549.

**§ 792. Supplemental Bill Setting Up Matter of Special Replication.**

If the new matter has arisen since the filing of the original bill the plaintiff may set up that matter in a supplemental bill, provided the record is otherwise in condition to permit of the filing of such bill.<sup>9</sup>

**§ 793. Pleadings Subsequent to Replication.**

Under the former system of pleading a defendant had a right to put in a special rejoinder to a special replication, if he thought fit to do so; and the pleadings might proceed even further than the rejoinder. The abolition of the special replication, however, had the result of terminating the pleadings with the general replication; and accordingly, in the practice of the federal courts, the cause is effectually at issue when the general replication is filed.<sup>10</sup>

In the English chancery the cause was not considered at issue upon the filing of a replication. A formal subpoena to rejoin had to be issued, and the service of this subpoena put the cause at issue.<sup>11</sup>

**§ 794. Issue Made by General Replication.**

The purpose of the general replication is to put in issue all the facts stated in the answer considered as a defensive pleading, and this it effectually does. After a replication is put in the defendant cannot at the hearing have the benefit of a defense set up in the answer, unless he proves it or the plaintiff admits it. The rule has been stated to be that the replication denies every allegation in the answer not responsive to the bill.<sup>12</sup> This proposition is perhaps technically true in a certain aspect of the matter, but it is somewhat misleading. Practically, it is more correct to say that the replication puts in issue all of the issuable facts in the answer, whether responsive or unresponsive.

**§ 795. Defects Waived by Replication.**

The filing of a replication admits the sufficiency of the answer in respect to the matter of discovery, and the plaintiff cannot thereafter

<sup>9</sup> *Vattier v. Hinde* (1833) 7 Pet. 252, 274, 8 L. ed. 675, 682.

<sup>10</sup> "In all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side." Equity Rule 6d.

<sup>11</sup> 1 Smith Ch. Pr. (2d ed.) 338. In *Penn v. Butler* (1801) Wall. (U. S.) 4, Fed. Cas. No. 10,931, the subpoena to rejoin was allowed.

<sup>12</sup> *Humes v. Scruggs* (1877) 94 U. S. 22, 24 L. ed. 51.

bring in exceptions for insufficiency of the answer.<sup>13</sup> Mere irregularities and informalities in the answer are also waived by filing a replication.<sup>14</sup>

### *Requisites of Replication.*

#### **§ 796. Form of Replication.**

In form the general replication needs to contain merely a formal traverse and joinder of issue upon the defensive allegations of the answer. It should be expressed in words to the following effect: For replication to the answer of the defendant C D in this cause, comes the plaintiff A B by his solicitor and, reserving to himself the benefit of all proper admissions and disclosures contained therein, joins issue upon said answer and every allegation thereof; and this replicant is ready to prove all the matters contained in his bill as this honorable court may direct.

A satisfactory replication could no doubt be drawn even more briefly. The complicated old form contained in the books, with its unintelligible inversions and meaningless reservations, may safely be laid aside. The continued use of it is due to the fact that the filing of the replication is a formality usually left to subordinates or to the clerk.

#### **§ 797. Insufficient General Replication.**

If the replication fails to traverse all the averments of the answer, it cannot be treated as a general replication at all; and if the cause is heard on bill, answer, and replication, the matters not traversed by the replication must be taken as admitted,<sup>15</sup> for as to these the case stands as if it were heard on bill and answer only and not on bill, answer, and replication. In such case the plaintiff should not allow the cause to proceed to a hearing, but should ask leave to file the usual general replication.

#### **§ 798. Surplusage in Replication.**

A replication containing the essential qualities of a general replication will be sustained as such, although it also contains new matter which would be appropriate for a special replication provided such

<sup>13</sup> No. 62, Lord Bacon's Ordinances. <sup>15</sup> *Dupont v. Mussy* (1821) 4 Wash.  
<sup>14</sup> *McGorray v. O'Connor* (1898) 31 C. C. 123, Fed. Cas. No. 4,183.  
C. C. A. 114, 87 Fed. 586.

form of pleading were in use. The new matter will here be treated as surplusage.<sup>16</sup>

### § 799. Title and Signature to Replication.

The replication should, like an answer, be entitled with the appropriate heading in order to identify it with the particular cause to which it belongs.<sup>17</sup> It should also be signed by the solicitor of the plaintiff or by the plaintiff himself, where the latter appears in person.<sup>18</sup> As long as the replication is considered necessary to complete the pleadings and make up an issue, albeit the step is purely formal, the signature of the plaintiff's solicitor or the signature of the plaintiff should be affixed, in order to show that the pleading is filed by authority.<sup>19</sup>

### § 800. Time to File Replication.

The time within which the plaintiff is required to put in his replication, as deduced from equity rule 66, may be defined thus: If the answer has been excepted to for insufficiency, and the court has adjudged the same to be sufficient, or if the court has adjudged the answer insufficient and a good answer has been filed in obedience to the order of the court, then the replication must be filed on or before the rule day next succeeding that on which the answer was adjudged sufficient or on which the sufficient answer was forthcoming. On the other hand, if no exceptions for insufficiency are brought in, the plaintiff must reply on or before the rule day next succeeding that on which the answer was filed. In other words, the period for taking exceptions does not count unless the exceptions are actually taken.<sup>20</sup> It has, however, been held by the circuit court of appeals of the eighth circuit that equity rule 66 is to be so interpreted as to allow a period

<sup>16</sup> *Wren v. Spencer Optical Mfg. Co.* No. 11 of Rules of Circuit Court for (1879) 5 Bann. & Ard. 61, Fed. Cas. No. Northern District of California. 18,062.

<sup>17</sup> 2 Dan. Ch. Pr. 388.

<sup>18</sup> A replication is probably a pleading within the meaning of the following rule: "Every pleading shall be signed by or with the name of the attorney or solicitor of record, except where the party has appeared in person, in which case the paper shall be signed by such party; and every pleading shall have legibly indorsed thereon the title of the cause, the general character or designation of the pleading." <sup>19</sup> Mr. Daniell cites authority to the effect that the signature of counsel is required to a replication only when it is special and not when it is general. 2 Dan. Ch. Pr. 388. We surmise that this will not authorize dispensing with the signature of the solicitor under the federal practice.

<sup>20</sup> *Heyman v. Uhlman* (1888) 34 Fed. 686; *Sayles v. Erie Ry. Co.* (1879) Fed. Cas. No. 12,418; *Robinson v. Randolph* (1879) 4 Bann. & Ard. 317, Fed. Cas. No. 11,963.



of two rule days after the filing of the answer, before a plaintiff is in default for failure to file his replication. The first rule day period is available for the taking of exceptions, and the case remains open for such purpose whether exceptions are actually filed or not. After that period is gone, another rule day must pass before the case can be dismissed for want of replication.<sup>21</sup> We are unable to see that this is the correct interpretation of the rule.

The limit of time for filing a replication is not shortened by the circumstance that the defendant puts in his answer before the rule day at which such answer is required. The time within which the replication is to be filed is computed from the rule day at which the answer must be put in and not from an earlier rule day.<sup>22</sup>

#### § 801. Separate Replications to Separate Answers.

If two or more defendants answer separately, each answer, upon coming in, must be replied to within the proper time without reference to the state of the pleadings as regards the other defendant or defendants. Any one whose answer is sufficient has a right to have the cause brought to issue as to him, so that he may proceed to take testimony. Any embarrassment that might result to the plaintiff from this, in respect to the taking of his proof against such defendants, can be obviated by a proper order extending his time.<sup>23</sup>

#### *Want of Replication.*

#### § 802. Result of Plaintiff's Failure to Reply.

Under the present practice the plaintiff is bound, upon penalty of the dismissal of his suit, to file his replication within the time limited by the rule; and the defendant does not, as formerly, have to leave a "rule to reply" with the clerk, before getting the benefit of the plaintiff's default.<sup>24</sup> Equity rule 66, prescribing the practice now to be followed in case of plaintiff's failure to file his replication in the required time, says that upon such default "the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court or a judge

<sup>21</sup> *Hendrickson v. Bradley* (C. C. A.; which to reply after the answer was 1896) 29 C. C. A. 303, 85 Fed. 508.

<sup>22</sup> *Heyman v. Uhlman* (1888) 34 Fed. 686.

<sup>23</sup> *Coleman v. Martin* (1868) 6 Blatchf. 291, Fed. Cas. No. 2,986.

<sup>24</sup> Under the earlier practice the plaintiff was given sixty days within *Brent v. Venable* (1827) 3 Cranch C. C. 227, Fed. Cas. No. 1,842.

thereof shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed."

It will be noted that under this rule the defendant is entitled to his order for a dismissal, if the replication is not timely filed. If he fails to take advantage of the situation, and does not procure the order of dismissal, the plaintiff can of course file his replication after the normal period for the taking of this step has elapsed. The defendant cannot take advantage of it thereafter, because, by failing to have the suit dismissed, he must be considered to have waived his technical advantage. Certainly if a replication is filed after the time described by the rule, but before an order of dismissal has been procured, it is within the discretion of the court afterwards to order the replication to stand.<sup>25</sup>

If, before a motion to dismiss is entered, the plaintiff sets the cause for hearing on bill and answer, the want of replication becomes immaterial, and the plaintiff's bill is no longer subject to dismissal on that score but must be heard on bill and answer.<sup>26</sup>

A replication filed after some of the proof had been taken has been held, on appeal, to have been filed in time, no objection having been made in the court below. The statute of jeofails would also be a sufficient warrant for sustaining the replication in this situation.<sup>27</sup>

### § 803. Order Dismissing Bill for Want of Replication.

The order dismissing the bill for failure to file a replication is entered in the clerk's office by the clerk without the intervention of the judge. It is an order as of course.<sup>28</sup> But if the matter is brought before the court by a formal motion to dismiss, it is not bad practice. If this is done, the plaintiff can then resist the motion by showing an excuse for the delay and by making application for leave to file a replication *nunc pro tunc*.<sup>29</sup>

### § 804. Leave to File Replication Nunc Pro Tunc.

The circuit courts should be liberal in permitting replications to be filed *nunc pro tunc*, especially when the application is timely and

<sup>25</sup> *Fischer v. Hayes* (1881) 6 Fed. 76.

<sup>26</sup> *Reynolds v. Crawfordville Bank* (1884) 112 U. S. 406, 28 L. ed. 733.

<sup>27</sup> *Clements v. Moore* (1868) 6 Wall. 290, 18 L. ed. 786.

<sup>28</sup> *Robinson v. Satterlee* (1874) 3 Sawy. 134, Fed. Cas. No. 11,967.

<sup>29</sup> *Robinson v. Randolph* (1879) 4 Bann. & Ard. 317, Fed. Cas. No. 11,963.

it appears that no delay in the cause can thereby be occasioned.<sup>30</sup> In a case where the time for the taking of proof had not passed and the cause in natural course could hardly have been reached for trial on the merits before the fall term, it was held to be error for the circuit court to refuse permission to file a replication when application was made at the May term.<sup>31</sup>

The fact that negotiations for a compromise have been pending between the parties to a suit is a sufficient excuse to justify the court in allowing a replication to be filed after the proper time has passed.<sup>32</sup>

### § 805. When Application Comes Too Late.

An application to vacate the order of dismissal and to allow a replication to be filed will not be considered unless such application is made in a reasonable time. It has been held that a plaintiff who permits five years to pass during which time the cause has stood dismissed, cannot then come in and have it reinstated, no good excuse for the delay being apparent.<sup>33</sup> Leave to file a replication has been refused where the cause had been set for hearing on bill and answer, and judgment given for the defendant.<sup>34</sup> But by the better practice it is permissible for the court, in the exercise of its discretion, to allow the replication to be filed in such case.<sup>34a</sup>

### § 806. Want of Replication Waived at Hearing on Merits.

To go to final hearing on bill, answer, and proof, without any replication at all having been filed, is irregular. The defect, however, is not so serious but that it may be waived; and it is waived by going to the hearing.<sup>35</sup> The absence of formal replication to an answer is of no great consequence, where the parties have taken testimony as if the general replication had been filed and no motion to dismiss on this ground has been made. In such case the court may proceed as if the replication had been filed, or it will permit one to be put in *instante*.<sup>36</sup>

<sup>30</sup> *Heyman v. Uhlman* (1898) 34 Fed. 696; *Robinson v. Randolph* (1879) 4 Bann. & Ard. 317, Fed. Cas. No. 11,963.

<sup>31</sup> *Hendrickson v. Bradley* (C. C. A.; 1898) 29 C. C. A. 303, 85 Fed. 508. But in this case the circuit court of appeals refused to reverse for the error, because the case as it came up on appeal showed want of merit.

<sup>32</sup> *Robinson v. Randolph* (1879) 4 Bann. & Ard. 317, 39 Fed. Cas. No. 11,963.

<sup>33</sup> *Robinson v. Satterlee* (1874) 3 Sawy. 134, Fed. Cas. No. 11,967.

<sup>34</sup> *Bullinger v. Mackey* (1877) 14 Blatchf. 356, Fed. Cas. No. 2,128.

<sup>34a</sup> See *post*, § 820.

<sup>35</sup> *Washington R. Co. v. Bradley* (1869) 10 Wall. 299, 19 L. ed. 694.

<sup>36</sup> *Jones v. Brittan* (1872) 1 Woods 607, Fed. Cas. No. 7,455; *Fischer v. Wilson* (1879) 16 Blatchf. 220, 4 Bann. & Ard. 228, Fed. Cas. No. 4,612.

On appeal no objection can be taken on account of the absence of the replication.<sup>37</sup>

*Withdrawal of Replication.*

§ 807. Leave of Court to Withdraw.

A replication may be withdrawn by the plaintiff in order to amend his bill. This, however, is not permitted except upon a special order of the court, or judge of the court, on motion or petition, after due notice to the adversary party, and upon proof by affidavit that the application is not made for vexation or delay, or that the matter of the proposed amendment is material and could not with reasonable diligence have been sooner introduced in the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.<sup>38</sup> The plaintiff may also obtain leave, upon motion, to withdraw his replication in order to set the cause for hearing on bill and answer.<sup>39</sup>

§ 808. Withdrawal by Consent.

By agreement of the parties a replication may be withdrawn, or treated as if it were withdrawn, and the cause heard on bill and answer.<sup>40</sup> But the mere setting of a cause for hearing on bill and answer, after a replication has been filed, can hardly be properly treated as overruling the replication.<sup>41</sup> There should be an order of court allowing the replication to be withdrawn, or a formal stipulation.

<sup>37</sup> *National Bank v. Insurance Co.* (1881) 104 U. S. 54, 25 L. ed. 693; *Brown v. Pierce* (1868) 7 Wall. 205, 19 L. ed. 134.

<sup>38</sup> Equity Rule 29.

<sup>39</sup> 2 Dan. Ch. Pr. 369.

<sup>40</sup> *Beeson & Co. v. Goodman* (1906) 147 Fed. 887.

<sup>41</sup> The contrary suggestion in *Moore v. Hylton* (1830) 16 N. C. (1 Dev. Eq.) 439, seems not to be good law for federal courts.

## CHAPTER XIX.

### HEARING ON BILL AND ANSWER.

#### *Nature and Incidents of Hearing on Bill and Answer.*

- § 809. Testing Legal Sufficiency of Defense.
- 810. Exceptions Do Not Reach Question of Legal Sufficiency.
- 811. Demurrer to Answer Not Recognized in Equity Practice.
- 812. Hearing on Bill and Answer.
- 813. How Cause Set for Hearing on Bill and Answer.
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- 815. Admissions of Answer.
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#### *Hearing on Bill, Answer, and Replication.*

- 821. Hearing on Pleadings without Proof.
- 822. Resemblance of Such Hearing to Hearing on Bill and Answer.
- 823. Two Modes of Hearing Distinguished.
- 824. Setting Cause for Hearing on Pleadings.

#### *Nature and Incidents of Hearing on Bill and Answer.*

#### § 809. Testing Legal Sufficiency of Defense.

We have now seen that the relevancy and materiality of the averments of an answer can be tested by exceptions for impertinence, and that the sufficiency of the disclosures of the answer, as regards discovery, may be tested by exceptions for insufficiency. It remains to inquire of the method whereby to test the question of the sufficiency of the answer as a defensive pleading. Granting that all the statements of the answer are pertinent and that those statements are fully responsive to the allegations of the bill, what step may be taken by the plaintiff when it appears that the answer sets up no good defense and is wholly insufficient as a matter of law?

#### § 810. Exceptions Do Not Reach Question of Legal Sufficiency.

In answering this question, the first point to be observed is that the ordinary exceptions for insufficiency will not serve the purpose.

These go solely to the sufficiency of the answer in respect of discovery, and it is reversible error to treat exceptions for sufficiency as raising the question of the legal sufficiency of an answer, as a demurrer would raise the question of the legal sufficiency of a plea in an action at law.<sup>1</sup>

It may be urged that special exceptions might be framed going to the matter of the legal sufficiency of the answer without reference to the sufficiency of the discovery; but the reply to this suggestion is that exceptions are founded on the idea of pointing out defects in the answer and compelling the defendant to make a good answer. Clearly the plaintiff has no purpose of his own to serve in compelling a defendant to substitute an answer showing a good defense for one that shows no defense at all. Accordingly, we find that exceptions to the legal sufficiency of an answer are in bad form and are unrecognized in equity practice.<sup>2</sup>

#### § 811. Demurrer to Answer Not Recognized in Equity Practice.

A demurrer, one can imagine, might possibly be used to test the legal sufficiency of the answer. But here again we are met by the fact that equity practice does not recognize such procedure. The demurrer to an answer, if not exactly unknown, is not recognized as a proper proceeding.<sup>3</sup> If a demurrer is filed to an answer, the defendant should move to strike it out, and this will be done; but the plaintiff will be given leave to set the cause for hearing on bill and answer, or to file a replication as he may prefer.<sup>4</sup>

The rule that a demurrer to the answer is not admissible in equity practice may seem curious, but in fact it is a necessary consequence of fundamental conceptions of equity pleading. If demurring to an

<sup>1</sup> *Walker v. Jack* (C. C. A.; 1898) 31 C. C. A. 462, 88 Fed. 576. & *Tool Co. v. Howe, Brown & Co.* (1895) 157 U. S. 312, 39 L. ed. 713.

<sup>2</sup> Nevertheless, the idea seems at one time to have occurred to the supreme court that exceptions to the legal sufficiency of an answer may be treated as equivalent to setting a cause down for hearing on bill and answer, especially if no objection is taken by the defendant to the irregularity of the proceeding. The embarrassment that resulted from putting this idea into effect caused it to be abandoned; and it is undoubtedly reversible error to treat exceptions of any sort as equivalent to setting a cause for hearing on bill and answer. See *In re Sanford Fork & Tool Co.* (1895) 160 U. S. 247, 40 L. ed. 414; *Sanford Fork*

<sup>3</sup> *Walker v. Jack* (C. C. A.; 1898) 31 C. C. A. 462, 88 Fed. 576; *Adams v. Bridgewater Co.* (1881) 8 Fed. 179; *Barrett v. Twin City etc. Co.* (1901) 111 Fed. 45; *Crouch v. Kerr* (1889) 38 Fed. 549; *Stokes v. Farnsworth* (1900) 99 Fed. 836.

<sup>4</sup> *Crouch v. Kerr* (1889) 38 Fed. 551. If a demurrer is put in to an answer and no motion is made to strike the same from the files or other objection taken by the adverse party, it will sometimes be treated in effect as a setting of the cause down for hearing on bill and answer. See *infra*, § 812.

answer were permissible then, indeed, should we be confronted with an anomaly. The key to the puzzle is found in the fact that, in point of principle, there can be no such thing as an answer insufficient as a matter of law, in the sense that on such answer as a pleading the plaintiff would be entitled to a decree. Our ideas on this subject are likely to be hopelessly confused with ideas imported from the field of common-law pleading. In actions at law the principle of constructive admissions prevails so that at each successive stage of the pleading either party admits the truth of all matters set up by his adversary that are not expressly denied. Hence if, at any particular juncture, the pleading of either party is found to be insufficient in law, when tested by a demurrer, judgment is thereupon given in favor of his adversary on the constructive admission embodied in the defective pleading. But in equity there are no constructive admissions, and when a defendant puts in an answer that shows no good defense, the plaintiff cannot demur to that answer; for if he did and the answer were adjudged to be bad in law, the plaintiff could not get a decree and would merely have his trouble for his pains. A decree in equity can be based only on the facts alleged in the bill and admitted or proved. All that can be said about a defendant who files an answer bad in point of law is that he thereby puts himself in a position where he will in the end doubtless lose his cause.

#### § 812. Hearing on Bill and Answer.

In what is said above we have considered the answer merely as a pleading and without reference to admissions of fact favorable to the plaintiff that may be contained in it. Now it not infrequently happens that an answer contains admissions enough to entitle the plaintiff to a decree; and it is certainly desirable that there should be some means by which this may be tested. Such a procedure is supplied by the practice of setting the cause for hearing on bill and answer. We may observe that while the plaintiff, in setting a cause for hearing on bill and answer, primarily contemplates getting the benefit of the admissions of the answer, there is inseparably connected with the proceeding a feature which involves the idea and principle on which a demurrer is founded. As a consequence we find that though the simple demurrer to the answer is excluded from the system of equity practice, the principle underlying the demurrer appears here in combination with another principle. *Naturam expellas furca tamen usque recurrit*. This phenomenon can be explained by reference to the fact that every answer contains, or

may contain, admissions or denials responsive to the allegations of the bill and also new and unresponsive matter set up by way of defense. If the plaintiff's case is admitted in the answer and no defense is set up, the plaintiff ought to be allowed to get his decree in some expeditious way, and so he does by setting the cause for hearing on bill and answer. He is certainly as much entitled to a decree on an answer admitting the cause of action as he would be if the defendant had not answered at all and a *pro confesso* had been taken. On the other hand, if the answer admits the allegations of the bill and yet proceeds to set up a good defense in avoidance of the case made in the bill, it is plain that the plaintiff ought not to have a decree on bill and answer. But, of course, if the defense set up in avoidance of the case made in the bill and admitted in the answer is insufficient, the plaintiff should get his decree as in case no attempt had been made to set up a defense. It will thus be perceived that the hearing on bill and answer operates to test both the adequacy of the admissions of the answer and the legal sufficiency of the defense set up in the answer, where a defense is set up at all. In the latter feature the procedure has exactly the same force and effect as a demurrer. It is for this reason that the process of setting a cause for hearing on bill and answer is said to be a substitute for a demurrer. But it should not be forgotten that the demurrer feature here involved goes only to the defense set up in the answer and has nothing to do with the other part of the answer. The analogy between the hearing on bill and answer and the hearing on demurrer has sometimes caused the courts to treat a formal demurrer as an informal setting of the cause for hearing on bill and answer. This is certainly proper where no objection is made to the proceeding in the court below and the cause goes up on appeal.\* As regards the circuit courts, the practice is not to be commended.

Any bill for relief or discovery and relief can be set for hearing on bill and answer; but a bill of discovery alone cannot, since no decree can be entered on such a bill, and the plaintiff is merely entitled to use the answer as evidence in another suit.†

### § 813. How Cause Set for Hearing on Bill and Answer.

A cause is set for hearing on bill and answer by the entry of a notice, or rule, to that effect, in the order book in the clerk's office.

\* *Grether v. Wright* (C. C. A.; 1896) 23 C. C. A. 498, 75 Fed. 743; *Banks v. Manchester* (1888) 128 U. S. 250, 32 L. ed. 428.      † *Hendryx v. Perkins* (1902) 52 C. C. A. 435, 114 Fed. 802.



The option of thus setting the cause for hearing is with the plaintiff, and if he wishes to take the step, he should do so within the time allowed for the filing of a replication, for if he permits that period to pass his bill is subject to dismissal.<sup>7</sup> But if the defendant neglects to enter the order for the dismissal of the suit for want of replication until after the cause has been set down for hearing on bill and answer, the cause will be heard on bill and answer. In such case, a motion by the defendant to dismiss the suit for want of a timely replication will not be entertained.<sup>8</sup>

### § 814. Defects Waived by Hearing on Bill and Answer.

Setting a cause for hearing on bill and answer waives informalities and irregularities in the answer and also such errors and defects as might be reached by exceptions for sufficiency. For instance, at the hearing, on bill and answer, the plaintiff cannot object that the defendant has not stated, in connection with a particular response, that it was made upon information and belief.<sup>9</sup>

### § 815. Admissions of Answer.

In considering the advisability of trying the cause on bill and answer, the plaintiff should bear in mind that at such a hearing he gets the benefit only of the defendant's actual admissions. Such admissions may, of course, be express or they may be such as result from the necessary implications of the answer. The statements of the bill are in no event evidence in the plaintiff's favor. Those allegations merely constitute the plaintiff's pleading. When proved or

<sup>7</sup> Equity Rule 86.

In the Circuit Court of the Eastern District of Pennsylvania there is a special equity rule by virtue of which the failure of the plaintiff to file a replication by the next rule day, after ten days' notice to reply, operates as a constructive submission of the cause for hearing on bill and answer. No. 2 of Rules in Equity for that circuit.

<sup>8</sup> *Reynolds v. Crawfordville Bank* (1884) 112 U. S. 405, 28 L. ed. 753.

<sup>9</sup> *Beason & Co. v. Goodman* (1908) 147 Fed. 887.

The opinion in the case of *Sanford Fork & Tool Co. v. Howe, Brown & Co.* (1895) 157 U. S. 312, 39 L. ed. 713, exhibits a confusion between the practice incident to hearing a cause on exceptions to the sufficiency of the answer

and the practice incident to hearing a cause on bill and answer. This confusion led to the case being brought before the court a second time, whereupon Mr. Justice Gray distinguished between the hearing on exceptions to the answer and the hearing on bill and answer as follows: "When a case in equity is set down for hearing on bill and answer, the whole case is presented for final decree in favor of either party. But when the matter set down for hearing is the plaintiff's exceptions to the answer, the case is not ripe for a final decree; the only question to be decided is the sufficiency of the answer; and no final decree can be entered against either party, unless it declines or omits to plead further." *In re Sanford Fork & Tool Co.* (1895) 160 U. S. 247, 40 L. ed. 414.

admitted they constitute the basis of the decree. As proof they are of no moment to the plaintiff, and are unavailing except so far as they are actually admitted in the answer. In arguing a cause on bill and answer the plaintiff does not get the benefit of any constructive admission of the truth of his bill, as does the plaintiff at law in disposing of a plea to the declaration, or as does the plaintiff in equity when arguing the sufficiency of a plea to the bill. The answer does not, like a plea, constructively admit anything whatever.<sup>10</sup> The setting down of a case for hearing on bill and answer is in effect a submission of the cause to the court by the plaintiff on the contention that he is entitled to a decree as prayed for in his bill, upon the admissions and notwithstanding the denials of the answer.<sup>11</sup>

In construing the admissions of the answer, "the court is not authorized to supply anything not expressed in it, beyond what is reasonably implied from the language employed."<sup>12</sup>

#### § 816. Answer as Evidence for Defendant.

By the failure of the plaintiff to reply and by his setting the cause for hearing on bill and answer, the defendant is deprived of the right to prove the truth of his answer and in consequence the answer must be assumed to be true. The defendant is therefore entitled to the benefit of all denials in the answer of the matters set forth in the bill, and he is entitled to the benefit of all affirmative matters of defense that are well pleaded in the answer.<sup>13</sup> "On setting the cause down for hearing on bill and answer the case is put at issue, the answer becomes evidence, and the only evidence the defendant needs, for it must be taken as true in all respects. There is, therefore, no necessity for a replication or for the taking of testimony."<sup>14</sup>

#### § 817. Abandonment of Hearing on Bill and Answer.

A plaintiff who has set a cause down for hearing on bill and answer may, by leave of the court, abandon such hearing, file a replication, and proceed to take proof. In the case cited below,<sup>15</sup> the

<sup>10</sup> The suggestion to the contrary in *Fed. 820; Bank v. Manchester (1888) Klenk v. Byrne (1906) 143 Fed. 1006, 128 U. S. 244, 32 L. ed. 425, 9 Sup. Ct. 1010, is clearly erroneous.* *36; U. S. v. McLaughlin (1885) 24 Fed.*

<sup>11</sup> *Crouch v. Kerr (1889) 38 Fed. 823.*

<sup>12</sup> *Brown v. Pierce (1868) 7 Wall. 205, (1884) 112 U. S. 405, 409, 28 L. ed. 733, 19 L. ed. 134.*

<sup>13</sup> *Benson & Co. v. Goodman (1906) 147 Fed. 987; Atlantic Trust Co. v. Chapman (1906) 76 C. C. A. 398, 145*

<sup>14</sup> *Reynolds v. Crawfordville Bank (1884) 112 U. S. 405, 409, 28 L. ed. 733.*

<sup>15</sup> *Perkins v. Hendryx (1887) 31 Fed.*

plaintiff set a cause for hearing on the original bill, supplemental bill, and answer to the supplemental bill. The defendant then filed an answer to the supplemental bill, setting up a new defense. Instead of abandoning the hearing on bill and answer, and proceeding to file a replication, as he had a right to do and should have done, the plaintiff went to the hearing on bill and answer, relying on his ability to get the answer to the supplemental bill stricken for irregularity. The court, however, refused to strike the supplemental bill and heard the cause on bill and answer, entering a decree in favor of the defendant.

### § 818. Hearing—Documents.

The hearing on bill and answer is to be had in court during term time and not at chambers.<sup>16</sup> At such hearing, "a decree ought not to be made but upon hearing the answer read in court."<sup>17</sup>

If by mistake the court adjudicates a cause, at the hearing on bill and answer, on some other answer than that on which the cause was set for hearing, the decree is vitiated by the error.<sup>18</sup>

As a general rule the plaintiff cannot give evidence to contradict the averments of the answer.<sup>19</sup> The only recognized exception to this rule, if it can be considered an exception, is that self-proving records referred to in the answer and incorporated in it by reference may be read. Other documentary evidence referred to in the answer may also be read if it is such as may be proved *viva voce* by witnesses at a hearing and is so proved.<sup>20</sup>

### § 819. Decree for Plaintiff.

A final decree will be rendered for the plaintiff when it appears (1) that the answer contains sufficient admissions to make out the plaintiff's case and (2) that the answer does not state an affirmative defense sufficient to defeat that case. Upon good cause shown, the defendant may undoubtedly be permitted, at the hearing on bill and answer or thereafter before final decree, to file an amended or supplemental answer, subject to the conditions stated in equity rule 60.

<sup>16</sup> *Campbell Printing-Presses etc. Co. v. Manhattan etc. R. Co.* (1891) 48 Fed. 351, Fed. Cas. No. 10,909. 344. <sup>19</sup> *Peirce v. West* (1816) Pet. C. C. <sup>20</sup> 2 Dan. Ch. Pr. 627. As to *viva*

<sup>17</sup> No. 64, Lord Bacon's Ordinances. *voce* proof of documents at the hearing,

<sup>18</sup> *Perkins v. Hendryx* (1906) 149 *see, post*, §§ 1621-1624, Fed. 526.

§ 820. Decree for Defendant—Discretion of Court to Allow Replication.

If the answer does not contain sufficient admissions to sustain the equity of the bill, or if, containing such admissions, it yet sets up other matter by way of defense sufficient to defeat the case made in the bill, a decree dismissing the bill may be entered for the defendant. This decree is a final decree on the merits and is determinative of the controversy, unless the court in its discretion permits the plaintiff to file a replication and proceed to proof. A notion seems to have been current at times in this country to the effect that the court, on finding in favor of the defendant, has no discretion to permit a plaintiff to file a replication and proceed to take proof; and leave to file a replication has sometimes been refused in such cases, though the application therefor was accompanied by an affidavit showing that the plaintiff probably had a good cause of action. Having elected to try the cause on bill and answer, the plaintiff, so it is supposed, must abide the consequences.<sup>21</sup> This idea, however, is clearly erroneous. By the practice of the English chancery, a plaintiff who failed to make out his case at the hearing on bill and answer was permitted to reply, if he desired to do so, on the payment of costs.<sup>22</sup> This is the rule that should prevail in the federal courts, especially where it appears that the plaintiff, in setting the cause for hearing on bill and answer, acted in good faith and not merely for purposes of vexation or delay.<sup>23</sup>

*Hearing on Bill, Answer, and Replication.*

§ 821. Hearing on Pleadings without Proof.

The technical hearing on bill and answer can be had only when the cause is specially set for such hearing at the proper juncture. A suit is not heard on bill and answer when it comes on for hearing

<sup>21</sup> Bullinger v. Mackey (1877) 14 Blatchf. 355, Fed. Cas. No. 2,126.

At an early day the circuit court for the district of Pennsylvania permitted a replication to be filed after a cause had been heard on bill and answer and referred to the auditor, the court observing that the indulgence was due to the fact that chancery courts did not exist in that state and the gentlemen of

the legal profession there were unaccustomed to equity practice. Peirce v. West (1816) Pet. C. C. 351, Fed. Cas. No. 10,909.

<sup>22</sup> 2 Dan. Ch. Pr. 628.

<sup>23</sup> Besson & Co. v. Goodman (1906) 147 Fed. 887, 889. Said Platt, D. J.: "There being no right to file a demurrer in equity practice, there would appear to be no way to attack the substance

after replication and is submitted without proof. In such case the hearing is on the pleadings, consisting of the bill, answer, and replication. Upon principle the hearing of a cause on bill and answer and the hearing when the cause is submitted on the pleadings without proof are quite different, and it is important to distinguish between them. The similarity has, indeed, been the cause of not a little confusion. Certainly, in many cases, the result is the same, when a cause is submitted on the pleadings without proof, as it would have been if the cause had been specially set for hearing and had been heard on bill and answer. But this does not always happen. We shall note both the points of similarity and the points of dissimilarity.

### § 822. Resemblance of Such Hearing to Hearing on Bill and Answer.

In both proceedings the cause is in fact heard and is determined on the contents of the bill and answer, since the replication (in causes submitted on the pleadings) is purely formal and has no other office than to effect a joinder of issue. In both proceedings relief can be granted only on the actual admissions of the answer. In neither case does the factor of constructive admissions play any part in the determination of the cause. It is sometimes said that in both proceedings "the answer must be taken as true."<sup>24</sup> This is only a half truth and is misleading. It applies in fact only to those matters in the answer that are responsive to the allegations of the bill, in a word, to the admissions and denials or qualified admissions and denials of the answer.

### § 823. Two Modes of Hearing Distinguished.

The critical difference between the technical hearing on bill and answer and the hearing on the pleadings without proof is revealed when we come to consider the effect of new matter set up in the answer by way of defense. At the hearing on bill and answer, the answer is taken to be true in every point; and in consequence the defendant there gets the full benefit of any good defense disclosed in his answer. It is right that this should be so. That proceeding

of an answer, except to bring the matter forward for hearing on the bill and answer. When this has been done in the best of faith, and the case at bar is an instance of such good faith, it would not conduce to an orderly and speedy disposition of causes if it shall become the rule that the complainant can only make such attack at the risk of being dismissed if it shall appear to the court that he took a wrong view of things."

<sup>24</sup> United States v. Ferguson (1892) 54 Fed. 28,

deprives the defendant of the privilege of taking proof to support his defense, and hence the defense must be assumed to be true. When a plaintiff sets a cause for hearing on bill and answer the defendant has no option, but must abide by the proceeding. As a demurrer would admit the truth of the facts stated in a pleading to which it is directed, so the setting of the cause for hearing on bill and answer admits the truth of the facts stated in the answer by way of defense.

Where the cause is submitted on the pleadings without proof, the rule is different. Here the defendant has had his opportunity to take proof in support of his defense. If he fails to avail himself of this opportunity, and at the final hearing it appears that the answer admits the facts constituting the equity of the bill, the plaintiff gets his decree. The good defense set up in the answer but not proved goes for nothing. The replication traverses the defense set up in the answer and leaves the defendant in a position where he can get no benefit from the defense without proving it. At a hearing on the pleadings without proof the only question is whether the answer contains sufficient admissions of the material allegations of the bill to justify a decree in the plaintiff's favor. If it does not, the decree must be in favor of the defendant.<sup>25</sup> The admissions of the answer have the same efficacy whether the oath to the answer has been waived or not.<sup>26</sup>

The following case presents a situation where the plaintiff must have failed at a hearing on bill and answer, if the cause had been so set for hearing, nevertheless at the final hearing on the pleadings without proof he obtained a decree.

*Clements v. Moore* (1867) 6 Wall. 299, 18 L. ed. 796: To a bill by judgment creditors to reach and subject land conveyed by the debtor N. to one M. and then conveyed by the latter to the wife of N., the wife answered. She insisted that the land came to her from M. for a valuable consideration, in this, that she had given M. for the land certain notes which he (M.) had executed to N. her husband. She added that the notes in question were transferred to her by her husband in consideration of money advanced. It was held that the admission that she had paid for the land with notes that had once belonged to her husband was fatal to her defense, in the absence of affirmative proof that they came for a valuable consideration. Said the court: "It is an established rule of evidence in equity, that where an answer which is put in issue admits a fact, and insists upon a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved; otherwise the admission stands as if the fact in avoidance had not been averred."

<sup>25</sup> *Robinson v. American Car, etc. Co.* 24 See *Harvey v. Sellers* (1902) 115 (C. C. A.; 1905) 63 C. C. A. 331, 135 Fed. 757, 760.  
Fed. 693, affirming (1904) 132 Fed. 165.  
Eq. Prac. Vol. I.—32.

**§ 824. Setting Cause for Hearing on Pleadings.**

After the period for the taking of proof has expired without any having been taken, either party may set the cause for hearing the same as if full proof had been put in by both parties.<sup>27</sup>

The cause should be set for hearing before the court in term time and not before the judge at chambers. In the Southern District of New York, the cause is not thus set for hearing until it has been regularly put on the equity calendar.<sup>28</sup>

The formalities in regard to the setting of a cause for hearing on the pleadings, where no proof has been taken, do not differ materially from those that are observed in setting a cause for hearing on the merits in regular course.<sup>29</sup>

<sup>27</sup> *McGorray v. O'Connor* (C. C. A.; either party within thirty days after 1898) 87 Fed. 586, 31 C. C. A. 114. It will be remembered that a cause can be set for hearing on bill and answer by the plaintiff only.

<sup>28</sup> So said in *Campbell Printing-Press etc. Co. v. Manhattan etc. R. Co.* (1891) 48 Fed. 344.

<sup>29</sup> As to which, see post, §§ 1898-1900.

## CHAPTER XX.

### PLEAS.

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- 826. Plea Not Vehicle of Discovery.
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- 828. Plea Sets Up Extrinsic Matter.
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860. Plea Setting Up Contract between Husband and Wife.

*Nature and Office of Plea.***§ 825. Analogy of Plea to Answer.**

The plea, as has been frequently observed, is a sort of special answer. Instead of being a detailed reply to all of the allegations of the bill, as is the answer, it sets up some particular fact or facts as a cause why the suit should be either dismissed, delayed, or barred, as a whole, or why some part of the bill should not be answered. Only that defense is proper for a plea which reduces the cause, or some part of it, to a single point and from thence creates a bar to the suit, or to the part of it to which the plea applies.<sup>1</sup>

**§ 826. Plea Not Vehicle of Discovery.**

A plea differs from an answer in the circumstance that whereas an answer contains matter of discovery as well as matter of defensive pleading, the plea is a pleading purely and never contains matter of discovery. As a plea does not contain matter of discovery, it sometimes happens that a plea must be accompanied by an answer as a vehicle of discovery; for the defendant is not permitted to avail himself of the defense set up by his plea without satisfying the plaintiff in point of the matter as to which the latter is entitled to discovery. The conditions under which a plea must be accompanied or supported by an answer will be considered later.

**§ 827. Plea Reduces Cause to Single Issue.**

By using a plea as a mode of defense and thus reducing the cause to a single and well-defined issue, the defendant often avoids the trouble and expense incident to the examination of the cause at large; and furthermore the defendant may thereby sometimes protect himself from prejudicial disclosures. "The office of a plea is not, like an answer, to meet all the allegations of the bill, nor like a demurrer, admitting those allegations, to deny the equity of the bill; but it is to present some distinct fact, which of itself creates a bar to the suit, or to the part to which the plea applies, and thus to avoid the

<sup>1</sup> 2 Dan. Ch. Pr. 97.

necessity of making the discovery asked for, and the expense of going into the evidence at large." <sup>3</sup>

### § 828. Plea Sets Up Extrinsic Matter.

Primarily and generally speaking, the office of the plea is to import new matter into the record, to bring in some fact or state of facts not apparent on the face of the bill, that will operate to displace the equity of the bill and make out a good defense to the matters therein alleged and stated. A plea generally presupposes equitable matter in the bill and sets up extrinsic matter to avoid it.<sup>3</sup>

Where the matter that vitiates the cause is apparent on the bill itself, the defendant should demur; and a plea that merely sets forth matters so apparent is bad.<sup>4</sup> When matter fatal to the cause of action appears on the face of the bill, a demurrer thereto raises an issue of law; if the matter does not so appear but has to be imported into the cause by plea, the issue so raised is one of fact.

*Farley v. Kittson* (1887) 120 U. S. 303, 315, 30 L. ed. 684, 688, 7 Sup. Ct. 534: The plaintiff had been receiver of a railroad and, while acting in this capacity, had made a contract with certain persons whereby he was to have an interest in bonds of the railroad to be purchased by them and also in the property purchased at the foreclosure sale. After the sale had been consummated, he filed a bill to enforce the contract. The defendants pleaded that, by reason of his fiduciary capacity, the plaintiff was disabled from entering into such a contract as that stated in the bill and that it was therefore void. The plea was overruled because the matter stated was available by demurrer, and defendant was required to answer the bill. "A plea must aver facts to which the plaintiff may reply, and not, in the nature of a demurrer, rest on facts in the bill."

### § 829. Plea Based Partly on Facts Stated in Bill.

Though a defendant cannot properly plead exclusively matters of fact that are apparent on the face of the bill, it is yet permissible to

<sup>3</sup> *Farley v. Kittson* (1887) 120 U. S. 303, 314, 30 L. ed. 684, 688, 7 Sup. Ct. 534; *United States v. California etc. Land Co.* (1893) 148 U. S. 31, 39, 37 L. ed. 254, 359; *United States v. Peralta* (1900) 90 Fed. 624.

<sup>4</sup> *Rhode Island v. Massachusetts* (1840) 14 Pet. 262, 10 L. ed. 447.

<sup>5</sup> *Farley v. Kittson* (1887) 120 U. S. 316, 30 L. ed. 689; *Rhode Island v. Massachusetts* (1840) 14 Pet. 269, 10 L. ed. 451; *McCloskey v. Barr* (1889) 38 Fed. 166; *Garrett v. New York etc. Co.* (1896) 29 Fed. 129; *Noyes v. Wil-*

*lard* (1871) Fed. Cas. No. 10,374; *Blackburn v. Stannard* (1842) Fed. Cas. No. 1,468.

"A demurrer is properly upon matter defective contained in the bill itself, and no foreign matter; but a plea is of foreign matter to discharge or stay the suit, as that the cause hath been formerly dismissed, or that the plaintiff is outlawed or excommunicated, or there is another bill depending for the same cause, or the like." No. 66, Bacon's Ordinances.

set up a plea containing facts averred in the bill along with other and additional facts not contained in the bill, provided the facts taken from the bill and the new facts imported into the record by the plea, taken together, constitute a defense to the bill.<sup>5</sup>

### *Defenses Available by Plea.*

#### § 830. Matters Pleadable in Abatement.

In regard to the nature of the defense that may properly be set up in a plea to a bill in equity, it may be stated generally that any fact or combination of facts may be pleaded which, without going into the full merits, shows a good and complete defense to the whole or a part of the bill. A few illustrations will show, better than any general statement can do, the nature of the defenses that are usually presented by pleas in equity.

Of matters in abatement, the following may be mentioned, viz.: lack of the requisite diversity of citizenship,<sup>6</sup> the bankruptcy of the plaintiff,<sup>7</sup> want of corporate existence on the part of the plaintiff, and the consequent lack of capacity to sue,<sup>8</sup> the pendency of another suit between the same parties in regard to the same subject-matter.<sup>9</sup>

It should be observed that there are some matters in abatement that must be set up by plea or they are not available at all, being waived by an answer to the merits. Such are matters of form and, formerly, matters pertaining to the statutory jurisdiction of the court.<sup>10</sup> But

<sup>5</sup> *Missouri Pacific R. Co. v. Texas*, 46; *Jones v. League* (1855) 18 How. 76, etc. R. Co. (1892) 50 Fed. 152.

<sup>6</sup> *De Sobry v. Nicholson* (1865) 3 (1866) 19 How. 397, 15 L. ed. 691; *Wall*, 420, 18 L. ed. 263; *Livingston v. Whyte v. Gibbes* (1857) 20 How. 542; *Story* (1837) 11 Pet. 351, 9 L. ed. 746; 15 L. ed. 1016; *Livingston v. Story Dodge v. Perkins* (1827) Fed. Cas. No. (1837) 11 Pet. 351, 9 L. ed. 746; *Conard 3,954; Pond v. Vermont Val. R. Co.* (1874) Fed. Cas. No. 11,265.

<sup>7</sup> *Kittredge v. Claremont Bank* (1845) (1828) 1 Pet. 476, 7 L. ed. 227; *Evans v. Gee* (1837) 11 Pet. 85, 9 L. ed. 641; Fed. Cas. No. 7,858.

<sup>8</sup> *Oregonian R. Co. v. Oregon etc. Co.* (1884) 22 Fed. 246, (1885) 23 Fed. 232; *Union Cement Co. v. Noble* (1892) 15 Fed. 502.

<sup>9</sup> *Pierce v. Feagans* (1899) 39 Fed. 587.

<sup>10</sup> Equity Rule 39; *De Sobry v. Nicholson* (1865) 3 Wall. 420, 18 L. ed. 263; *Sims v. Hundley* (1848) 6

How. 1, 12 L. ed. 319; *Smith v. Kernochen* (1849) 7 How. 216, 12 L. ed. 673; *Sheppard v. Graves* (1852) 14 How. 509, 14 L. ed. 519; *Wickliffe v. Owings* (1854) 17 How. 51, 15 L. ed.

15 L. ed. 263; *Dred Scott v. Sandford* (1856) 19 How. 397, 15 L. ed. 691; *Whyte v. Gibbes* (1857) 20 How. 542; *Story* (1837) 11 Pet. 351, 9 L. ed. 746; 15 L. ed. 1016; *Livingston v. Story Dodge v. Perkins* (1827) Fed. Cas. No. (1837) 11 Pet. 351, 9 L. ed. 746; *Conard v. Atlantic Ins. Co.* (1828) 1 Pet. 383, 450, 7 L. ed. 189, 217; *D'Wolf v. Rabaud* (1828) 1 Pet. 476, 7 L. ed. 227; *Evans v. Gee* (1837) 11 Pet. 85, 9 L. ed. 641; *Rhode Island v. Massachusetts* (1838) 12 Pet. 719, 9 L. ed. 1258; *Dodge v. Perkins* (1827) 4 Mason 436; *NeSmith v. Calvert* (1845) 1 Woodb. & M. 37; *Brown v. Noyes* (1846) 2 Woodb. & M. 81; *Chapman v. School District* (1865) Fed. Cas. No. 2,607; *Blachly v. Davis* (1839) Fed. Cas. No. 1,456.

No. 20 of Rules of Circuit Court for N. D. California provides that all matter in abatement in cases where pleas are permissible shall be set up by plea, and if not so set up shall be waived; provided that objections to the federal ju-

since the Act of March 3, 1875, the defect incident to a want of jurisdiction is available at any stage and under any form of objection.<sup>11</sup>

It has been ruled that where a suit is brought by a stockholder, a defense founded on the idea that the suit brought for the ulterior purpose of promoting the interest of a rival company and not in good faith for the honest purpose of enforcing the plaintiff's own rights in the particular case, is such matter in abatement as is waived, if not pleaded in abatement.<sup>12</sup>

A question of plaintiff's right to sue in a federal court, arising from non-compliance with the state laws concerning foreign corporations, must, if the defect is available at all in a federal court, be presented by plea in abatement. It is not available when raised at the final hearing on the merits.<sup>13</sup>

### § 831. Practice in Regard to Pleas in Abatement.

Pleas in abatement in equity are governed substantially by the same rules as pleas in abatement at law;<sup>14</sup> but the stringent rules applied by the courts of common law in regard to dilatory pleas, such as pleas to the jurisdiction, do not maintain in equity. Here there is no distinction in point of practice between dilatory pleas and any other pleas. For instance, in equity, a plaintiff cannot ordinarily treat a dilatory plea, subject to a mere formal defect, as a nullity. He must make application for an order setting it aside for irregularity or move to take it off the files.<sup>15</sup>

However, if the defect of form consists of a failure to comply with the requirement of equity rule 31 in regard to the plea being accompanied by a certificate and affidavit, the plea may be wholly disregarded.<sup>16</sup>

jurisdiction may be taken as provided by rule 93 of the rules for the same circuit.

<sup>11</sup> See *ante*, §§ 376, 377, 378.

Section 1,611 R. S., which declares that "there shall be no reversal in the supreme court or in a circuit court [now circuit court of appeals] upon a writ of error, for error in ruling any plea to the jurisdiction," has no application to suits in equity, since these go up not by writ of error but by appeal.

<sup>12</sup> *Dinsmore v. Central R. Co.* (1883) 19 Fed. 153.

<sup>13</sup> *Wetzel etc. R. Co. v. Tennis Broc.* (1906) 75 C. C. A. 266, 145 Fed. 464.

That, generally speaking, the state legislatures have no power to prevent a corporation from maintaining a suit in the federal court is manifest. *Orange Nat. Bank v. Traver* (1881) 7 Sawy. 210.

<sup>14</sup> *Livingston v. Story* (1837) 11 Pet. 416, 9 L. ed. 772.

<sup>15</sup> *Ewing v. Blight* (1855) Fed. Cas. No. 4,589.

<sup>16</sup> *National Bank v. Insurance Co.* (1881) 104 U. S. 76, 26 L. ed. 702.

### § 832. Matters Pleadable in Bar.

Of defenses that can be presented by pleas in bar the following are illustrations: the statute of limitations,<sup>17</sup> the statute of frauds, innocent purchase, account stated, award, release, tender, payment, *non est factum*, prematurity of suit, and such like defenses.<sup>18</sup> Want of interest on the part of the defendant in the subject-matter of the suit is good ground for a plea,<sup>19</sup> though the more usual mode of raising this defense is by a simple disclaimer.

### § 833. Plea of Former Adjudication.

That the subject-matter of the suit has already been determined by former adjudication between the same parties is a good plea.<sup>20</sup> It will be observed that this plea of *res judicata* is a plea in bar, while the very similar plea of former suit pending is a plea in abatement. A former adjudication effectually concludes the controversy; the pendency of another suit concludes nothing, but merely shows why the second suit should not be maintained for the time being.

### § 834. Plea Setting Up Laches of Plaintiff.

The question of laches on the part of the plaintiff, or staleness of the claim sued on, may be raised by plea in an infringement suit<sup>21</sup> as in some other cases;<sup>22</sup> but since the defense of laches goes to the merit, the better practice apparently is to relegate that defense to the answer. The trend of modern decisions is against trying cases by piecemeal, as is done when the issue of laches is raised by plea. It is better to embody such a defense in the answer, yet, as stated above, it may sometimes be raised by plea.<sup>23</sup>

<sup>17</sup> *Wilson v. Koontz* (1812) 7 Cranch 202, 3 L. ed. 315.

The courts being judicially bound to take notice of the statute of limitations, it is not necessary to make express reference to the statute in the plea. This rule applies in federal courts as regards all state statutes that are binding on those courts. *Harpending v. Reformed Dutch Church* (1842) 16 Pet. 466, 10 L. ed. 1029.

<sup>18</sup> *Gibson*, *Suits in Chan.* (2d ed.) §§ 330, 332, 333, 334.

<sup>19</sup> *Williams v. Empire Transp. Co.* (1878) Fed. Cas. No. 17,720.

<sup>20</sup> *Desert King Min. Co. v. Wedekind* (1901) 110 Fed. 877.

A former adjudication which appears

to have been determined on a point not decisive of the merits, is not good ground for a plea of *res adjudicata*. This rule has been applied where the former suit was dismissed for want of jurisdiction, and where the decree of dismissal was expressly without prejudice. *Walden v. Bodley* (1840) 14 Pet. 156, 10 L. ed. 398; *Garrett v. New York etc. Co.* (1886) 29 Fed. 129.

<sup>21</sup> *Edison etc. Co. v. Equitable Life Soc.* (1893) 55 Fed. 476; *Wilcox & White Co. v. Farrand Organ Co.* (1905) 139 Fed. 46, 48.

<sup>22</sup> *Lansdale v. Smith* (1882) 106 U. S. 391, 27 L. ed. 219.

<sup>23</sup> Laches is available at the hearing without having been pleaded at all.

§ 835. *Plea of Want of Parties.*

Want of proper parties has been held to be matter in bar and not merely in abatement. It accordingly affords good ground for a plea in bar.<sup>24</sup> A plea raising this question must, of course, name the parties who are supposed to be necessary and show why they are necessary.<sup>25</sup>

While want of proper parties is a proper subject for a plea in bar, the practice in regard to this plea is peculiar, in that a determination of it adversely to the plaintiff does not result in the peremptory dismissal of the plaintiff's bill. He has a right to bring the parties in if he can.<sup>26</sup> To this end the plaintiff will be allowed to amend by making the new parties.

§ 836. *Matters Not Proper for Plea.*

It is not the province of a plea to interpose defenses that go to the merits and relate in no wise to matters in abatement or in bar. Such defenses should be raised by answer.<sup>27</sup> For this reason, a plea of noninfringement in a suit for the infringement of a patent has been considered a bad plea, and such a plea will be entertained only under special circumstances.<sup>28</sup> Usually the court will overrule it with leave to the defendant to rely on the same in his answer,<sup>29</sup> and this is very good practice.

*Sullivan v. Portland etc. R. Co.* (1876) 94 U. S. 808, 24 L. ed. 324; *Moore v. Nickay* (1904) 66 C. C. A. 667, 133 Fed. 289; *Credit Co. v. Arkansas Cent. R. Co.* (1882) 15 Fed. 46; *Lakin v. Sierra Buttes Gold Min. Co.* (1885) 25 Fed. 337; *Johnson v. Florida, T. & P. R. Co.* (1883) 18 Fed. 821; *Leavenworth County Com'rs v. Chicago, R. I. & P. Ry. Co.* (1886) 25 Fed. 219; *Pratt v. California Min. Co.* (1883) 24 Fed. 869; *Woodmanse & Hewitt Manuf'g Co. v. Williams* (C. C. A.; 1895) 16 C. C. A. 520, 68 Fed. 489.

<sup>24</sup> *Tobin v. Walkinshaw* (1855) McAll. 26, Fed. Cas. No. 14,068; *Goldsmith v. Gilliland* (1885) 24 Fed. 154; *Hammond v. Hunt* (1879) Fed. Cas. No. 6,003.

Want of proper parties may also be suggested in the answer, and Equity Rule 52 makes provision for the speedy determination of such question. See ante, §§ 754, 755.

The want of necessary parties who are nevertheless dispensable affords no basis

for a plea, where the bill alleges that they are not joined because out of the jurisdiction of the court. *Milligan v. Milledge* (1895) 3 Cranch 220, 2 L. ed. 417.

<sup>25</sup> *Sheffield & B. Coal, Iron & Railway Co. v. Newman* (C. C. A.; 1896) 77 Fed. 787, 23 C. C. A. 459, *certiorari denied* Neely v. Newman (1897) 18 Sup. Ct. 944, 166 U. S. 708, 42 L. ed. 1211; *Dwight v. Central Vermont R. Co.* (1861) 9 Fed. 785.

<sup>26</sup> *Hammond v. Hunt* (1879) Fed. Cas. No. 6,003, 4 Bann. & Ard. 111.

<sup>27</sup> *Sharp v. Reissner* (1881) 9 Fed. 445; *Rhode Island v. Mass.* (1840) 14 Pet. 210, 10 L. ed. 423.

<sup>28</sup> *Knox Rock-Blasting Co. v. Rairdon Stone Co.* (1898) 87 Fed. 909; *Sharp v. Reissner* (1881) 9 Fed. 445; *Hubbell v. De Land* (1882) 14 Fed. 471; *Korn v. Wiebusch* (1887) 33 Fed. 59; *Chisholm v. Johnson* (1898) 84 Fed. 384.

<sup>29</sup> *Chisholm v. Johnson* (1896) 84 Fed. 384.

*Affirmative, Negative, and Anomalous Pleas.***§ 837. Sorts of Pleas—Affirmative Plea.**

The most important classification of pleas is found in the following threefold division: (1) pure, or affirmative, pleas, (2) negative pleas, and (3) anomalous pleas. The negative and anomalous pleas are said to be impure, by way of distinguishing them from pure, or affirmative, pleas.

The affirmative, or pure, plea is the normal type of the plea in equity. It consists entirely of new matter of defense not apparent in the bill. Such a plea proceeds on the idea that, admitting the case stated in the bill to be true, the matter suggested by the plea affords a sufficient reason why the plaintiff should not have the relief he prays or the discovery he seeks. In legal effect it admits the facts stated in the bill to be true, so far as they are not contradicted by the plea.<sup>\*\*</sup>

Gibson, *Suits in Chancery* (2d ed.) § 323: This writer makes the following exposition of the nature of the affirmative plea in bar: "The logic of an affirmative plea in bar is this: the complainant having omitted from the bill an essential matter of fact, which, if it had not been omitted, would have rendered the bill demurrable, the defendant may, by bringing this omitted essential matter of fact before the court, destroy the apparent case contained in the bill, and in this way terminate the litigation quickly and cheaply. Thus, a bill may show on its face a good cause of action, setting up many details, and praying for relief. If, however, the bill suppresses the fact that there has been a payment or a release, or a former adjudication, or that the suit is barred by the statutes of limitation, or that any other statutory or equitable defense exists, in any such case the defendant may set up this suppressed fact by a plea in bar, and thereby end the suit."

**§ 838. Negative Plea.**

A negative plea, on the contrary, does not bring new matter of defense into the record. It seeks to destroy the efficacy of the plaintiff's case by denying some single critical fact stated in the bill. Thus, where a bill is filed to redeem property from a mortgage, or to foreclose a mortgage, or to settle a partnership, a negative plea may be put in denying the existence of the mortgage or the existence of the partnership. So if a bill is brought by a party claiming as heir, personal representative, partner, or tenant in common, and the defendant desires to deny that the plaintiff has the character that he pretends to have, this fact may be put in issue by a negative plea. Simi-

<sup>\*\*</sup> *Goldsmith v. Gilliland* (1885) 24 Fed. 154.

larly, a defendant who is sued in a representative character, as heir, administrator, guardian, or the like, may, by means of a negative plea, put in issue the question whether he has the particular capacity imputed to him.<sup>21</sup>

In these and other like situations the negative plea serves the same end of narrowing the compass of the controversy as does the affirmative plea; and like the affirmative plea it admits in legal effect the truth of all the allegations of the bill not denied by the plea. A negative plea is proper whenever any alleged fact, essential to the relief sought, is false and can be so negatived as to present a single narrow issue of fact determinative of the suit.

Gibson, *Suits in Chancery* (2d ed.) § 323: "A negative plea in bar denies some essential allegation contained in the bill, some averment on which the case rests; and the logic of the plea is: that, inasmuch as the complainant's alleged rights all depend on a false allegation of a single essential matter of fact, it is unnecessary for the defendant to answer all the various charges and averments in the bill, when the suit can be ended by a plea denying the allegation of this one essential matter of fact. A negative plea in bar is the opposite of an affirmative plea; an affirmative plea in bar seeks to bring into the case an essential matter of fact which the bill has left out, while a negative plea seeks to strike out of the case an essential matter of fact which the bill has brought in. In other words, an affirmative plea seeks to end the suit by injecting into it a fatal fact, and a negative plea seeks to end the suit by extracting from it a vital fact. It is plain, that both affirmative and negative pleas in bar are really nothing more than short, pointed answers, intended to confine the litigation to a single issue, that, if decided in favor of the defendant, would end the suit."

### § 839. Recognition of Negative Pleas.

Pleas in equity were originally designed to set up new matter and at first all pleas were affirmative. But after affirmative pleas were adopted it was quite natural that negative pleas should, from the convenience of it, sooner or later be also recognized. When the experiment of setting up a negative plea was first made in equity it was unsuccessful;<sup>22</sup> but in the end the innovation was sanctioned, and negative pleas came to be fully recognized.<sup>23</sup> The introduction of

<sup>21</sup> Gibson, *Suits in Chan.* (2d ed.) §§ 322, 337.

<sup>22</sup> *Gun v. Prior* (1785) Forrester, 88, note, 1 Cox Ch. Cas. 197, 2 Dick. 657; *Newman v. Wallis* (1787) 2 Bro. Ch. 143.

Traces of the early prejudice against negative pleas are found in *Milligan v. Milledge* (1806) 3 Cranch 220, 2 L. ed. 417, where it is suggested that a negative

plea ought to be overruled, as mere matter of denial is appropriate for an answer but not for a plea. On overruling such a plea the court, would, of course, allow the defendant to rely on the same defense in his answer.

<sup>23</sup> *Hall v. Noyes* (1792) 3 Bro. Ch. 483, 489; *Rhino v. Emery* (1897) 79 Fed. 483.

Professor Langdell points out that



negative pleas brought much perplexity and confusion into the subject of equity pleading. This was due, partly at least, to the fact that the pleaders and the courts did not at first perceive that a negative plea requires the support of an answer.<sup>34</sup> The conditions under which the supporting answer is required will be considered further on in this work.<sup>35</sup>

#### § 840. Difficulty of Distinguishing Affirmative and Negative Pleas.

The verbal distinction between affirmative and negative pleas is a very easy one; but when one is required to answer the specific question whether a particular plea is affirmative or negative, grave difficulty is often encountered. In solving this question, little reliance can be placed on the form of the plea, for an affirmative plea is often found in negative guise, and a negative plea often assumes an affirmative form. The question must be determined in each case from the issues involved and the nature of the pleadings. If the plea amounts merely to a denial, direct or argumentative, of some fact that the plaintiff must prove, in order to obtain relief, whether such fact be alleged in the bill or not, the plea will be negative.<sup>36</sup> On the other hand, if the plea alleges some fact that is consistent with every fact necessary to be proved by the plaintiff, but that will yet prevent the plaintiff from obtaining relief, the plea is affirmative. It thus appears that the question whether a particular plea is affirmative or negative cannot be intelligently answered until the inquiry is answered, what facts must the plaintiff prove in order to obtain a decree?<sup>37</sup>

#### § 841. Anomalous Plea.

The anomalous plea is no doubt rightly named; for notwithstanding the fact that it is well established in equity pleading, it is truly an

negative plea first gained recognition under guise of the anomalous plea; and it was not at first perceived that the recognition of anomalous pleas involved the admission of purely negative pleas. See Langdell, Eq. Pl. 102.

<sup>34</sup> Langdell, Eq. Pl. 102.

<sup>35</sup> See *post*, ch. XXIII., § 984 *et seq.*

<sup>36</sup> *Vacuum Oil Co. v. Eagle Oil Co.* (1907) 154 Fed. 809. In this case the bill alleged that certain wrongful acts against which an injunction was sought were being done in this country and also in foreign countries. The plea averred

that the acts were being done exclusively in foreign countries. It was held that this was a negative plea. The reason is found in the fact that the issue here raised was on a fact that was part of the plaintiff's case. It was necessary to the exercise of jurisdiction over the case that the plaintiff should prove that the wrongful acts complained of were done partly in this country. The plea had the same effect as if it had alleged that those acts were not done in this country.

<sup>37</sup> Langdell, Eq. Pl. 102.

anomaly. Its peculiarities are due to the fact that two elements are combined in it.

To understand the nature and office of the anomalous plea, it is necessary to revert for a moment to the structure of the original bill. In discussing that topic, we called attention to the fact that the special replication has been banished from equity pleading. As a consequence, the plaintiff is bound to insert in his original bill any matter suitable for a special replication to the defendant's plea or answer. If he does not get that matter in at first, he must put it in by way of amendment after the need for it has been revealed by the defendant's plea or answer.

The normal way in which such matter is incorporated in the bill is this: First, the plaintiff states his own case; secondly, he sets forth the affirmative matter of defense on which he supposes the defendant will rely; lastly, he sets up new matter, such as would normally have gone into a special replication, to defeat that defense. It is proper, though not absolutely necessary, for the defendant explicitly to refer to the anticipated defense, because otherwise no basis would superficially appear for the introduction of the matter by which it is intended to subvert that defense.

Furthermore, it may be noted that, in setting out the anticipated defense, the plaintiff may proceed along either of two lines: thus he may either in terms admit the facts constituting the alleged defense and thence proceed to subvert it by the new matter on which he relies, or he may refer to that defense as a mere pretense on the part of the defendant and thence, without admitting it to be true, proceed to set up the new matter in avoidance of it. So far as the principles of equity pleading are involved, it makes no difference whether the plaintiff pursues the one course or the other;<sup>22</sup> but as regards the burden of proof it makes, of course, a very material difference whether the plaintiff has in terms admitted the existence of the defense he seeks to undermine, or not.

### § 842. Affirmative and Negative Elements of Anomalous Plea.

We shall suppose that the defendant avoids admitting the anticipated defense and sets it up merely by way of colorable pretense, thence proceeding to state matters of fact in avoidance of the sug-

<sup>22</sup> Professor Langdell has suggested simple negative plea will suffice. Langdell, *Eq. Pl.* 146. However, he admits that an anomalous plea is in strictness unnecessary where the bill anticipates that the defendant may plead the anomalous plea here, and the authorities are united it to be true. Here, says he, a

gested and pretended defense. In this situation it is necessary for the defendant to plead an anomalous plea, for he is bound to do two things. He must by an affirmative plea set up the matter alleged in the bill by way of pretense only, and he must also deny the matter set out in the bill to avoid that defense. Such is the function of the anomalous plea. It is affirmative in so far as it is a plea and negative in so far as it is a rejoinder. The anomalous plea relies on that which the bill seeks to avoid, and seeks to avoid that on which the bill relies. The anomalous plea is evidently a combined affirmative plea and negative rejoinder.

Langdell on Equity Pleading 101: This learned writer presents the theory of the anomalous plea thus: "If a bill anticipates a defense, and, without admitting its truth, replies to it affirmatively, and the defendant wishes to set up the defense by plea, it is obvious that he must traverse the anticipatory replication; for otherwise, in the event of issue being taken upon the truth of the plea, the affirmative replication will be admitted to be true. A negative rejoinder, therefore, must be incorporated with the affirmative plea. Such pleas have become common in modern times; and, being partly affirmative and partly negative, they are distinguished by the name of anomalous pleas. If the defendant should not be prepared to deny the truth of the affirmative replication, and should wish to set up an affirmative answer to it, of course both branches of his plea would be affirmative; but no instance of such a plea has been found in the reported cases. If an anomalous plea be put in issue, it will be seen that each party has something to prove, namely, the defendant his affirmative defense, and the plaintiff his affirmative replication."

2 Daniell, Chancery Practice, 108, 109: This author makes the following exposition of the grounds on which it is necessary to introduce negative averments into a plea containing matter of affirmative defense: "If there is any charge in the bill, which is an equitable circumstance in favor of the plaintiff's case against the matter pleaded, such as fraud or notice of title, the court will intend the matters so charged against the pleader, unless they are met by averments in the plea. . . . The necessity for the introduction of such averments into a plea is obvious, when we consider that a plea for the purpose of deciding on the validity of it, like a demurrer, admits all the facts stated in the bill to be true, so far as they are not controverted by the plea; so that whenever matters of fact are introduced to the bill, which, if true, would destroy the effect of the matter pleaded, the plea will be overruled, unless such matters are controverted by the averments."

#### § 843. Illustrations of Anomalous Plea.

The necessity for the use of an anomalous plea may arise in a suit for any sort of relief. However, this form of plea is chiefly identified with those situations, comparatively few in number, where the anticipated defense arises from former decree, award of arbitrators, release, account stated, innocent purchase, statute of limitations, and such like defenses. Here the matter of replication in the bill

consists of equitable circumstances sufficient to defeat the bar of the affirmative plea setting up those defenses, and the negative rejoinder in the plea traverses and denies those special circumstances stated in the bill by way of special replication. The following illustrations will amply illustrate the normal use of the anomalous plea:

(1) A plaintiff files a bill to establish a trust in real property or to obtain other equitable relief in respect to the same. An obstacle to the obtaining of this relief is found in the existence of an adverse decree of the same court, or of another court of competent jurisdiction, concluding the plaintiff's rights in respect to that matter. But the plaintiff may be able to show that the decree in the former suit ought not to be held binding on him because it was procured by fraud or fraudulent combination. Therefore, in his bill, he anticipates the defense arising from the former decree and avoids it by sufficient allegations of fraud and combination. The defendant thereupon files an anomalous plea setting up the former decree as an affirmative defense and negating the allegations of fraud and combination.<sup>30</sup>

Fraud and combination in this illustration is typical of any sufficient matter by which a decree may be avoided. The plaintiff might just as well rely on other matters, as that the decree is void for want of jurisdiction on the part of the court over him. He might assert, for instance, that he (the present plaintiff) was an infant when the other proceedings were had, and that his interest was not brought before the court in a way to make the decree binding on him.

(2) A plaintiff files a bill to have an accounting and settlement of partnership affairs or to have an accounting of transactions between himself as principal and the defendant as his broker and agent. An obstacle to the suit may consist of an award made by arbitrators appointed by the parties to settle the very matters now drawn in controversy. The plaintiff, however, finds that he is not bound by the award and that he can impeach it for fraud or misconduct of the defendant, or of the arbitrators, or for some fatal irregularity in the arbitration proceedings. He therefore suggests in his bill that the defendant relies on a pretended award of arbitrators but that (if reliance is placed on any such pretended award) the same is void and of no effect by reason of the defect or irregularity that he thereupon proceeds to specify. The principle is the same, of course, where the

<sup>30</sup> In every case where a bill charges fraud and combination as one of the grounds of relief, a plea setting up an affirmative defense based on matter affected by the fraud and combination charged in the bill must contain a denial of the fraud and combination, and hence such a plea is anomalous. It must be supported by an answer. Equity Rule 32.

obstacle to the relief sought, instead of being an award, consists of a release, executed by the plaintiff to the defendant, or of an account stated between them about the transactions in question. If any valid reason exists why the release or account stated should not operate with full effect, the plaintiff can anticipate the same and set forth the matter that avoids it. And the defendant is, in all such cases, bound to plead his anomalous plea.

(3) The plaintiff brings suit to recover an estate. An obstacle to the getting of relief is found in the fact that the defendant is in a position to put in a plea of innocent purchase. But the plaintiff apprehends that any such plea may be defeated by proof showing that, before the consideration was paid, the defendant had notice of the plaintiff's claim or had knowledge of facts and circumstances from which notice could be inferred. Consequently the plaintiff anticipates that defense in his bill and sets out the facts and circumstances affecting the defendant with the requisite notice. The defendant must then come back with an anomalous plea setting up the defense of innocent purchase and denying the facts and circumstances from which notice might be inferred.

(4) The plaintiff seeks relief upon a cause of action apparently barred by the statute of limitations. In such a bill the plaintiff should first state his title to equitable relief and then, after suggesting that the defendant pretends that the cause of action is barred, he should set out the equitable facts and circumstances that prevent the bar of the statute from attaching. The defendant thereupon pleads an anomalous plea setting up the defense of the statute and denying the circumstances that would prevent the bar of the statute from being effective.

The foregoing illustrations exhibit the conditions calling for the use of the anomalous plea in their fullest and most extended form. But the anomalous plea may appear in situations where the bill does not contain all of the parts or elements indicated above. For instance, in the illustrations given above, we have supposed that the bill seeks independent relief other than the removal of the obstacle referred to in the bill as a pretended defense. The principle, however, is the same where the bill is primarily addressed to setting aside the obstacle on which the defendant is expected to rely by plea. Thus a plaintiff may file a bill for no other purpose than to impeach a decree, to set aside a release, to open an account stated, or set aside an award of arbitrators. When the suit takes this form, the allegations of the bill are decidedly simpler and briefer than where affirmative

relief is sought, to the granting of which the decree, release, award, or account stated presents a mere obstacle. But the necessity for the use of the anomalous plea is the same; for the defendant must by plea set up and rely on the decree, release, award, or account stated, and he must, at the same time, negative the matter set forth in the bill as a ground for impeaching the decree, release, award, or account stated.

#### § 844. Omission of Allegation of Pretended Defense.

Sometimes the case presented by a bill is such that it is proper for the plaintiff, in his bill, to omit all explicit reference to the pretended defense on which the defendant is expected to rely, and yet at the same time the bill will be found on analysis to contain matter, the effect of which, if proved, will be to destroy that defense if it happens to be interposed. The illustrations above given in connection with the defenses of innocent purchase and the statute of limitations are here in point. A plaintiff who, in seeking equitable relief, is confronted with the possibility of being met with a plea of innocent purchase or a plea of the statute of limitations may, on the face of his bill, ignore such defense and yet at the same time, in his statement of facts, purposely bring out matter sufficient to avoid the plea, if it should be put in. All that need be remarked about this mode of framing the bill is that it does not at all affect the principles of pleading involved. The defendant should merely take note of the real nature of the matter contained in the bill and put in, as in other cases, an anomalous plea asserting the defense to which the bill fails expressly to refer and denying those matters in the bill that would avoid the plea. It is obvious that the part of the bill containing reference to the pretended defense is purely formal, and the omission of it cannot change the nature of the pleading. It may be incidentally observed that the necessity for the use of anomalous pleas more often arises in situations where the bill does not present all the elements enumerated in the extended illustrations given above than where it does present them all; and the difficulty in using anomalous pleas of course arises chiefly in connection with these abnormal cases. Illustrations of this type of bill will be found in the discussion of the supporting answer which will appear in a subsequent chapter.<sup>40</sup>

#### § 845. General Principle Governing Use of Anomalous Plea.

In conclusion it may be stated that an anomalous plea is necessary in every case (supposing that the defendant wishes to put in a plea

<sup>40</sup> See *post*, § 991.  
Eq. Prac. Vol. I.—33.

instead of answering) where the defendant wishes to rely on some affirmative defense, which defense appears to be defeated by some fact or facts stated in the bill. Before the affirmative plea can operate with effect in the defendant's favor, those adverse facts stated in the bill must be met and denied. This requires that the plea should contain a negative element, and the combination of this element with the affirmative element in the plea makes the plea anomalous.

The anomalous plea must be supported by an answer, the purpose of the answer being to give discovery as to the matter stated in the bill in avoidance of the defense. The subject of answers in support of pleas will be dealt with hereafter.<sup>41</sup>

### *General Requisites of Plea.*

#### **§ 846. Singleness of Issue Raised by Plea.**

One of the prime purposes of permitting pleas to be filed is to reduce the cause to a single, well-defined, and determinative issue. The convenience of the procedure justifies the court in thus permitting the suit to go off on an extrinsic issue not necessarily responsive to the equity of the case made in the bill. Where it appears that there are a number of such collateral and extrinsic issues each of which might properly be set up in a plea, the economy of procedure which the use of pleas contemplates is in a great measure lost; and the courts rightly reason that if more pleas than one are to be filed, with the attendant result of raising many distinct issues of fact, it would be more conducive to justice, and as economical in the end, to require a full answer and go into the merits as well as into the matter that would be covered by the several pleas. It follows that as a general principle the filing of numerous pleas is not encouraged. Only a single plea can be filed as a matter of right, and more can be filed only with the express permission of the court.<sup>42</sup> But the same will be permitted in a proper case.

Where several pleas have been filed without the permission of the court, the plaintiff by motion can compel the defendant to elect which

<sup>41</sup> See *post*, §§ 984-1007.

<sup>42</sup> *Bunker Hill etc. Min. Co. v. Shoshone Min. Co.* (1901) 109 Fed. 504, 47 C. C. A. 200; *McCloskey v. Barr* (1889) 38 Fed. 165; *Noyes v. Willard* (1871) Fed. Cas. No. 10,374, 1 Woods 187; *Lamb v. Starr* (1868) Fed. Cas. No. 8,021; *Wheeler v. McCormick* (1871) Fed. Cas. No. 17,498.

Leave to file an additional plea raising the question of want of proper parties has been refused on the ground that equity rule 52 authorizes the suggestion of this defect in the answer and makes provision for the speedy determination of the question so raised. *U. S. v. Gillespie* (1881) 6 Fed. 803.

plea he will stand on; <sup>43</sup> or the court may permit him to embody the several pleas in his answer.<sup>44</sup>

If several pleas are filed and the plaintiff, instead of making a motion to strike or to compel the defendant to elect as to which he will stand upon, sets them down for argument, the court may consider the question of their legal sufficiency without reference to the fact that they were filed without leave.<sup>45</sup>

#### § 847. Pleading Different Pleas to Distinct Parts.

The rule that a defendant cannot plead several matters, must not be understood as precluding a defendant from putting in several pleas to different parts of the same bill; it merely prohibits his pleading, without previous leave, a double defense to the whole bill, or to the same portion of it. A defendant may plead different matters to separate parts of the same bill; but where he puts in several pleas to the same bill, he must point out to what particular part of the bill each plea is applicable.<sup>46</sup>

#### § 848. Leave to Plead Several Pleas.

By leave of court a defendant can plead any number of defenses to all or any part of his bill. In passing on an application for leave to file several pleas, the court exercises its discretion. "Clearly, several pleas should not be allowed unless they present well-defined issues not interwoven with the alleged equities of the bill, which can be determined separately, without regard to such equities, and without injustice to the complainant."<sup>47</sup> Before granting leave to put in several pleas, the court must be convinced of the desirability of such a step, and perhaps even of a necessity for allowing such step to be taken.<sup>48</sup>

#### § 849. When Leave Will Be Granted.

The court will always permit several pleas to be filed where it appears that they present distinct defenses in abatement which would

<sup>43</sup> *Noyes v. Willard* (1871) 1 Woods 187, Fed. Cas. No. 10,374. <sup>44</sup> 2 Dan. Ch. Pr. 106.  
<sup>45</sup> *Reissner v. Anness* (1877) 3 Bann. 161. <sup>46</sup> *Gilbert v. Murphy* (1900) 100 Fed. & Ard. 148, Fed. Cas. No. 11,686. <sup>47</sup> *Lamb v. Starr* (1868) Deady 350.  
<sup>48</sup> *Wheeler v. McCormick* (1871) 8 Blatchf. 267, Fed. Cas. No. 17,488; *Newby v. Oregon Cent. R. Co.* (1870) Fed. Cas. No. 10,145. *Bunker Hill etc. Min. etc. Co. v. Shoshone Min. Co.* (1901) 47 C. C. A. 200, 100 Fed. 504.



not be available in an answer (under the rule that mere matter in abatement is waived by answer).<sup>49</sup> It is also supposed that permission would ordinarily be granted to file more than one plea, all going to the question of jurisdiction but on different grounds, such as lack of diversity of citizenship and insufficiency of the amount in controversy. And this although want of jurisdiction is no longer waived by answering but is available at any stage. The issue of want of jurisdiction is naturally a preliminary one and is eminently appropriate to be raised by plea. But, of course, if the court conceived that the putting in of the several pleas would unduly tend to delay the cause, the permission would not be granted, such matters being available at any stage.

### § 850. Order Granting Leave to File Several Pleas.

A mere recital in several pleas that they are filed by leave of the court does not show that such leave was in fact granted. This fact should appear of record in an appropriate order, obtained on motion. But if the plaintiff, without objecting to such lack of form, sets the pleas down for argument, the court may treat the objection as waived and proceed to consider the question of their sufficiency.<sup>50</sup>

### § 851. Plea Must Not Be Duplicitous or Multifarious.

The plea being recognized in equity pleading only because it conduces to limit the field of inquiry, it naturally results that the plea must present a single distinct issue. As the courts will not permit several distinct pleas to be filed without very good reasons appearing why it should be done, so in considering the scope and effect of each individual plea, it is required that the plea be concerned with only one subject-matter or at least with one defense. If a plea sets up two or more distinct defenses, it is said to be double or multifarious.<sup>51</sup>

<sup>49</sup> *United States v. Gillespie* (1881) 6 29 C. C. A. 33; *Cooper v. Preston* (1890) Fed. 803. See Equity Rule 39. 105 Fed. 403; *Schnauffer v. Aste* (1906) 148 Fed. 867; *Jahn v. Champagne Lumber Co.* (1907) 152 Fed. 689, 670.

<sup>50</sup> *McCloskey v. Barr* (1889) 38 Fed. 165.

<sup>51</sup> *U. S. v. California etc. Land Co.* 148 U. S. 31, 13 Sup. Ct. 458, 37 L. ed. 354; *Milligan v. Milledge* (1805) 3 Cranch 220, 2 L. ed. 417; *Hostetter Co. v. E. G. Lyons Co.* (1900) 99 Fed. 734; *Hazard v. Durant* (1885) 25 Fed. 26; *Rhino v. Emery* (1897) 79 Fed. 493; *Giant Powder Co. v. Safety Nitro Powder Co.* (1884) 19 Fed. 509; *Briggs v. Stroud* (1893) 58 Fed. 717; *MacVeagh v. Denver City Waterworks Co.* (1897) 85 Fed. 74,

The use of a plea and the reasons for its allowance are, that it saves time, trouble and expense; but if parties are permitted to multiply pleas, setting up different facts in avoidance of the plaintiff's claim, nothing is gained in these respects, and an answer is the proper course of pleading. *Reissner v. Anness* (1877) Fed. Cas. No. 11,636.

By Rule No. 20 of the Rules of the Circuit Court for the Northern District

The rule against duplicity and multifariousness in pleas operates with no hardship on the defendant since, under the rules of equity pleading, the benefit of all those different defenses can be had by setting them up in the answer. In common-law pleadings the defendant has no other mode of presenting various defenses than by plea, and consequently at law the rule against duplicity has been relaxed so as to permit several pleas to be pleaded at the same time.<sup>52</sup>

The rule that each plea must present no more than one defense was stated by Lord Hardwicke in the following words: "The defense proper for a plea must be such as reduces the cause to a particular point, and from thence creates a bar to the suit, and [its purpose] is to save the parties expense in examination; and it is not every good defense in equity that is likewise good as a plea; for where the defense consists of a variety of circumstances, there is no use of a plea, the examination must still be at large, and the effect of allowing such a plea will be that the court will give their judgment on the circumstances of the case before they are made out by proof."<sup>53</sup>

1. *Geimes v. Mousseaux* (1871) 1 Woods 118, Fed. Cas. No. 5,176: A plea to a bill of discovery for the recovery of real property was held bad for multiplicity where it set up: (1) that the plaintiff had a remedy at law, (2) that a suit was already pending concerning the same subject-matter, (3) that the defendant had made valuable improvements for which compensation should be allowed, and (4) prescription for thirty years. The court observed that this plea mixed up matters that were severally available by demurrer, plea in abatement, plea in bar, and answer.

2. *Rhode Island v. Massachusetts* (1840) 14 Pet. 210, 10 L. ed. 423: The state of Rhode Island sought to establish a boundary that would have brought within its limits considerable territory long held by the state of Massachusetts. The defendant put in a plea in bar to the bill which (as interpreted by a majority of the court) alleged, first, that in times past there had been a controversy between the two colonies as to their boundaries, that this dispute had been settled and adjusted by parties chosen by the colonies and that the assemblies of the respective states had ratified and confirmed said agreement, and, finally, that the boundary in question had ever since been maintained in conformity with that accord. Secondly, the plea set forth that, by reason of defendant's undisputed possession for a period of more than a hundred years from the original settlement of the boundary, it had acquired an unimpeachable

of California, a defendant can put in only one plea, but in this he "may plead as many grounds in abatement and as many grounds in bar as he may have, each of which grounds shall be separately stated; and if not so stated the court may overrule the plea, or may, in its discretion, allow the plea to be amended upon such terms as it shall deem just. The joinder in the same plea of grounds in abatement and grounds in bar shall not be deemed a waiver of the grounds in abatement."

<sup>52</sup> See *Reisaner v. Anness* (1877) 3 Bann. & Ard. 148, Fed. Cas. No. 11,686.

<sup>53</sup> *Chapman v. Turner* (1739) 1 Atk. 54. See *Rhode Island v. Massachusetts* (1840) 14 Pet. 210, 10 L. ed. 423.

title by prescription. It was held that the plea was double because it presented two distinct defenses, each perfectly good in itself, namely, accord and title acquired by prescription. Two of the judges, however, dissented, and they were probably right. If the plea had been framed in substance as is stated above, and as the majority of the judges interpreted it, that is to say, as presenting the two distinct issues mentioned, then the majority judges would have been right. But in fact the language of the plea was this: "And the said defendant doth plead the said agreement of January 19, 1710, and the said agreement in pursuance and confirmation thereof of October 22, 1718, and unmolested possession according to the same from the date of the said agreements, in bar to the whole bill." A just interpretation of this language seems to be that the unmolested possession is not here pleaded as a distinct source of title, as the majority assumed, but merely as an equitable circumstance showing the acquiescence of the plaintiff in that adjustment. In this view it might well be insisted that all the facts stated in the plea were conducive to the one defense, to wit, the conclusive character of the settlement. Said Mr. Justice Catron, dissenting: "It is insisted the plea is multifarious, because it relies on two defenses: first, the compacts; and second, the possession and occupation of the territory claimed by the plaintiff, for more than a century. The facts pleaded must be conducive to a single point of defense; and the question is, are the compacts, the marking of the line in part execution of them, and the taking and holding possession in other part and complete execution of them, combined facts and circumstances conducing to establish the single point relied on in defense? . . . And I think the circumstances pleaded are so connected as not to vitiate the plea." The plea in question was drawn by Mr. Webster, counsel for the state of Massachusetts, and there was good reason for the observation of Judge Catron to the effect that the plea and answer in that cause "are accurate in a high degree."<sup>54</sup>

A plea is objectionable for multiplicity where it sets up a lack of necessary parties, former suit pending in the same court, and want of jurisdiction over the property.<sup>55</sup> A plea of noninfringement in a patent suit is almost inevitably bad because it does not reduce the cause to a single issue.<sup>56</sup>

### § 852. Plea May State Many Facts Conducing to One Issue.

The rule that a plea must reduce the defense to a single ground does not mean that the plea must rely only on one matter of defense.

<sup>54</sup> The real significance of the opinion of the majority of the court in this case is found in the circumstance that the case was one within the original jurisdiction of the supreme court. This circumstance, together with the high character of the litigating parties and the great public interest involved, made it, as Chief Justice Taney observed in writing the prevailing opinion, "the duty of the court to mould the rules of chancery practice and pleading in such a manner as to bring this case to a final hearing on its real merits." Accordingly the plea was overruled, but not without a visible "moulding" of the rules.

<sup>55</sup> *Briggs v. Stroud* (1893) 58 Fed. 717.

<sup>56</sup> *Schnauffer v. Aste* (1906) 148 Fed. 867.

The plea may set forth a variety of facts and circumstances and yet be good, provided all those facts and circumstances tend to one issue and really make out only one defense. Inconsistent facts cannot be pleaded in the same plea; but facts are not incongruous or inconsistent when they all conduce to a single point.<sup>57</sup> Two separate agreements pertaining to the same subject-matter and together constituting one defense may be put into one plea.<sup>58</sup>

### § 853. Duplicity in Plea of Former Adjudication.

A plea is not subject to objection for duplicity where it sets up, in bar of a bill for relief, a former adjudication of the matter in controversy, though the decisions and judgments of the successive courts, through which the former suit passed, are set out; as these all together constitute only one adjudication.<sup>59</sup> But a plea which, in addition to setting up former adjudication in one particular litigation, also sets up former adjudication in a different litigation prosecuted in a different court from the other, is bad for duplicity.<sup>60</sup>

### § 854. Plea Must Be Certain and Explicit.

A plea in abatement of former suit pending must be strictly construed, and such a plea has been held defective for lack of sufficient clearness and precision where it alleged that the former suit was pending "when this suit was brought" without showing that it was still depending.<sup>61</sup>

A plea in an infringement case setting up a special contract vesting in the defendant the equitable right to use the patent is lacking in certainty where it fails to state the time of beginning and duration of the contract, and is otherwise so indefinite that the court could not enforce specific performance. That the alleged contract shows lack of mutuality as between the parties and is inequitable as to the person against whom it is set up, is also a fatal objection to such a plea.<sup>62</sup>

A plea in abatement alleging that the plaintiff in whose name the suit is brought is *non compos mentis* must allege that he has been so

<sup>57</sup> *Vacuum Oil Co. v. Eagle Oil Co.* (1903) 122 Fed. 105; *Goldsmith v. Gilliland* (1885) 24 Fed. 154; *Rhino v. Emery* (1897) 79 Fed. 483.

<sup>58</sup> *Hazard v. Durant* (1885) 25 Fed. 26.

<sup>59</sup> *Fayerweather v. Trustees* (1900) 103 Fed. 542.

<sup>60</sup> *Fayerweather Will Cases* (1900) 103 Fed. 548.

<sup>61</sup> *Briggs v. Stroud* (1893) 58 Fed. 717.

<sup>62</sup> *Harris v. Cleveland Block Co.* (1899) 95 Fed. 681, 37 C. C. A. 227.

found on an inquisition of lunacy or that a committee has been appointed.<sup>63</sup>

A plea of the statute of limitations is bad that does not show clearly on the face of the plea that the bar has attached, and where the bill alleges that some of the plaintiffs were under disability when their right of possession accrued and have so continued under disability, the plea must negative that fact.<sup>64</sup>

### § 855. Giving Plaintiff Better Writ.

The rule requiring the plea in abatement to give a better writ is applied in equity as at law. Thus, in a bill filed against several individuals for infringement of a patent, it was alleged that they were partners. A plea in abatement asserted that one of the defendants was not a member of the partnership. This plea was held to be bad in not stating who the actual parties were, and thereby "giving the plaintiff a better writ."<sup>65</sup>

### § 856. Plea Must Show Complete Bar.

The averments of a plea should be sufficiently clear, positive, and distinct to render the plea a complete equitable and legal bar to the whole suit, or to that part of it to which the plea is addressed, and to enable the plaintiff to take issue on its validity. A plea extending to the whole bill should set up such facts as make a complete defense; but this being shown, it is not necessary that the plea, even though of a negative character, should notice allegations of the bill that are in no way connected with the matter relied on in bar of the suit.<sup>66</sup>

*McCloskey v. Barr* (1889) 38 Fed. 165: In this case Jackson, Circuit Judge, discussing the requisites of a plea as regards the directness and explicitness of its allegations, said: "Pleas in bar are not favored, inasmuch as the defendant, especially in equity suits, has other and ample modes of defense open to him. They are accordingly required to be explicit in their averments, and upon their face to disclose a complete defense. All the facts necessary to render the plea a complete equitable bar to the case made by the bill (so far as the plea extends) must be clearly and distinctly averred in order that the complainant or plaintiff may take issue upon them. In a plea in bar the defendant assumes the *onus probandi*, and must state the case or facts on which he relies with the same clearness that a plaintiff or complainant is required to do when by his suit or bill he tenders the defendant an issue. When the defendant under-

<sup>63</sup> *Dudgeon v. Watson* (1885) 23 Fed. 161.

<sup>64</sup> *McCloskey v. Barr* (1889) 38 Fed. 165.

<sup>65</sup> *Computing Scale Co. v. Moore* (1905) 139 Fed. 197.

<sup>66</sup> *Rhode Island v. Massachusetts* (1840) 14 Pet. 271, 10 L. ed. 452.

takes by plea setting up matters *in pais* to bar the complainant, it is just as incumbent on him to set out the facts on which he relies as it will be incumbent to prove them on the trial of issues tendered. Strictness is demanded in such pleas. Thus it has been held that in a plea of a release the defendant must set out the consideration upon which the release was made in order to make the plea good. So, in setting up the plea of innocent purchasers without notice, the plea must contain all the requisites of such a defense, including the payment of the consideration."

An averment of a mere conclusion of law makes a plea bad,<sup>67</sup> and a plea is also bad if argumentative.<sup>68</sup> An ambiguity in the averments of a plea on a material point is fatal. But this does not hold where the plea, though apparently ambiguous, can be construed *uno intuitu* only.<sup>69</sup> A negative pregnant is objectionable in a plea in equity.

*Elaine v. Emery* (1897) 79 Fed. 423: The plaintiff sought to hold the defendant to an accounting as trustee for real and personal property. A plea filed to traverse the allegation of heirship averred that the plaintiff and defendant were not the "sole heirs" of the intestate as alleged. The averment was held to be bad as a negative pregnant. The averment did not deny that those mentioned were heirs, but only that they were sole heirs. The plea was treated as if the bad averment had not been put in.

### § 857. Plea of Innocent Purchase.

Though the innocent purchaser is favored in law, a plea setting up the defense of innocent purchase must be precise and full, and it must show the presence of every element necessary to constitute innocent purchase.<sup>70</sup> A plea of innocent purchase asserting that before receiving notice of plaintiff's interest, the defendant had paid part of the consideration and had given a mortgage for the remainder is bad.<sup>71</sup>

### § 858. Nature of This Defense—Requisites of Plea.

The defense embodied in the plea of innocent purchase is founded on the idea that where a defendant has a claim to the protection of the

<sup>67</sup> *National Bank v. Insurance Co.* (1881) 104 U. S. 76, 26 L. ed. 702; *U. S. 504, 507, 27 L. ed. 1012, 1013*; *Farley v. Kittson* (1887) 120 U. S. 303, *Vattier v. Hinde* (1833) 7 Pet. 271, 8 318, 30 L. ed. 684, 689; *McCloskey v. L. ed. 682*.

*Barr* (1889) 38 Fed. 165.

<sup>71</sup> *Wood v. Mann* (1833) 1 Sumn. 506,

<sup>68</sup> *McDonald v. Salem etc. Co.* (1887) Fed. Cas. No. 17,951.

31 Fed. 577.

<sup>69</sup> *Emma etc. Co. Limited v. Emma etc. Co.* (1890) 7 Fed. 401.

court of equity to defend his possession equal to the claim that plaintiff has to the assistance of the court in obtaining possession, the court will not interpose on either side, but will leave the parties in the position where it finds them. The requisites of the plea of innocent purchase have been stated as follows: (1) It must aver a conveyance. It must show that the defendant holds the land in dispute under a deed of purchase, giving its date, and the name of the vendor. An agreement to convey, or a title bond, is not sufficient. (2) It must aver that the vendor was seized, or pretended to be seized, in fee, at the time he executed the conveyance. If the conveyance pleaded be of an estate in possession, the plea must aver that the vendor was in possession at the time of the execution of the conveyance. And, if it be of a particular estate, and not in possession, it must set out how the vendor became entitled to the reversion. But although a bill be brought by an heir, the plea need not, on that account, aver the purchase to be from the complainant's ancestor. (3) The plea must, also, distinctly aver that the consideration money, mentioned in the deed, was *bona fide* and truly paid, independently of the recital of the purchase deed; for, if the money be not paid, the plea will be overruled, as the purchaser is entitled to relief against the payment of it. The particular consideration must also be stated. There can be no objection to the amount of the consideration; for, if it be valuable, the plea will not be invalidated by mere inadequacy. But the consideration must have been advanced at the time the title was taken; for a conveyance in consideration of a pre-existing debt will not protect the purchaser. (4) The plea must also deny notice of the plaintiff's title, or claim, previous to the execution of the deed and payment of the purchase money; for till then the transaction is not complete; and therefore, if the purchaser have notice previous to that time, he will be bound by it. The notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title. But a denial of notice, at the time of making the purchase and paying the money, is good. The notice must be positively and not evasively denied, and must be denied whether it be, or be not, charged by the bill. The defendant need only by his plea deny notice generally, unless facts are specially charged in the bill as evidence of notice.<sup>72</sup>

*Boone v. Chiloe* (1836) 10 Pet. 177, 9 L. ed. 388: In a plea of innocent purchase to a bill to set up a trust in real property, the defendant should state the deed of purchase under which he claims, the date of the transaction and,

<sup>72</sup> Gibson, *Suits in Chan.* (2d ed.) § 332.

briefly, the contents of the deed. He should allege that his vendor was seized in fee and in possession at the time the deed was executed. The consideration must also be stated with the distinct averment that it was *bona fide* and truly paid. The mere recital of the payment of consideration in the deed is not enough. The plea must further show that the defendant had no notice of plaintiff's equity prior to the payment of the consideration. If notice is specially charged, all the circumstances from which notice could be inferred must be denied.<sup>73</sup>

### § 859. Defense of Innocent Purchase in Answer.

The defense of innocent purchase cannot be made at the hearing unless set up by plea or answer; and when the defense is embodied in an answer it must contain substantially the same averments and be fully as explicit as if it were set up in a formal plea.

*Wormeley v. Wormeley* (1817) Fed. Cas. No. 18,047, 1 Brock. 390: To a bill by a *cestui que trust* to recover land conveyed by the trustee in breach of trust, the purchasers set up in their answer that they were innocent purchasers, for value and without notice, from a person who had purchased directly from the trustee. In meeting the charge of fraud, the defendants denied all fraud in themselves and all knowledge of fraud in the trustee or in the defendants' immediate grantor. This was held not to be sufficient. Said Marshall, Circuit Justice: "Fraud is an inference of law from facts, and this answer denies no fact alleged in the bill, nor does it deny a knowledge of those facts, with which knowledge they are charged, but states their opinion that no fact which has come to their knowledge is fraudulent. The answer then, though it does not confess, does not controvert, notice of the facts which prove a breach of trust."

### § 860. Plea Setting Up Contract between Husband and Wife.

A plea setting up a separation agreement between husband and wife need not be more particular and precise than a plea setting up any other contract between persons *sui juris*; nor is it necessary for such a plea to allege that the contract was fair, just, and reasonable to the wife. This rule is applicable in those jurisdictions where the wife has been put on an independent footing as regards her power to contract in reference to her property. Where the wife still labors under legal disability, the rule is perhaps different. Here she is presumed to be *sub potestate viri*, and the husband in such a case has been required to rebut the legal presumption which arises against the validity of the agreement by reason of the confidential relation.<sup>74</sup>

<sup>73</sup> A plea of innocent purchase is defeated by proof of notice showing that the purchaser was informed before the completion of the sale that the plaintiff had an interest in the subject-matter, though he was not informed as to the extent of that interest. *Farley v. Kittson* (1887) 120 U. S. 308, 316, 30 L. ed. 684, 689.

<sup>74</sup> See *Daniels v. Benedict* (1889) 27 Fed. 367, 38 C. C. A. 592.



## CHAPTER XXI.

### PLEAS (*continued*).

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*Formal Requirements.*

**§ 861. Frame of Plea.**

In drawing his plea the defendant should first state the style of the cause. This should be followed by an introductory statement identifying the pleading as the plea of the particular defendant who puts it in. The pleader next defines the scope of the plea by indicating whether it is directed to the whole bill or only to a particular part of it; and if it goes to a part only, the plea should show clearly just what part of the bill is covered by it. The body of the plea, like that of the demurrer, formerly began with a reservation, by way of protestation, to the effect that the defendant did not confess or acknowledge all or any part of the matters contained in the bill.<sup>1</sup>

<sup>1</sup> The defendant, by protestation, not confessing or acknowledging all or any part of the matters and things in the said bill of complaint contained, to be

This useless formality has apparently become obsolete in the equity practice of the state courts,<sup>2</sup> and it ought to be abandoned in the federal courts. It is, however, still preserved in the forms intended for lawyers practicing in the federal courts, and it is doubtless yet in common use. Instead of giving his attention to this empty form, the pleader should proceed at once to a clear, terse, and explicit statement of the matter on which he intends to base his defense.<sup>3</sup>

A separate paper filed with a plea and expressly referred to in the plea as a part of the plea is thereby incorporated in it and is to be read as a part of the same.<sup>4</sup>

### § 862. Prayer of Plea.

The plea concludes with a prayer for the judgment of the court whether the defendant ought to be required to make any further answer to the bill, or to that part of it to which the plea is addressed.<sup>5</sup> A plea is not objectionable, however, which concludes with a simple prayer that the defendant may be dismissed generally, or dismissed as to so much of the bill as the plea covers.<sup>6</sup>

### § 863. Affidavit of Defendant.

By equity rule 31 it is required that every plea to a bill in equity shall be verified by an affidavit of the defendant to the effect that the plea is true in fact and that it is not interposed for delay. This requirement is an innovation on the prior practice, as the English chancery did not require any affidavit that the plea was not interposed for delay, nor did it always require an affidavit of the truth of the plea.<sup>7</sup> Verification was necessary only in those cases where, if issue were joined on the plea, evidence upon oath would be required to sustain it at the hearing.<sup>8</sup> An oath to the plea was not necessary where the matter of the plea appeared on the record.<sup>9</sup>

true, in manner and form as the same are therein set forth, for plea nevertheless to the said bill, doth plead and aver. *Mitt. Eq. Pl.* (Tyler's ed.) 589.

<sup>2</sup> See Gibson, *Suits in Chan.* (2d ed.) § 339.

<sup>3</sup> A plea directed to part of the case covered by a bill should tersely state the substance of the objectionable matter. It has been said not to be in good form to attempt to point out such matter merely by reference to the lines and pages of the bill, especially where the pleadings are voluminous. *Greenwalt*

*v. Duncan* (1863) 15 Fed. 35. But evidently the mode of pointing out the matter to which the plea is addressed should depend to a good extent on the form of the bill.

<sup>4</sup> *Wheeler v. McCormick* (1871) 8 Blatchf. 267, Fed. Cas. No. 17,493.

<sup>5</sup> *Story, Eq. Pl.* 694.

<sup>6</sup> Gibson, *Suits in Chan.* (2d ed.) § 339.

<sup>7</sup> 1 Smith, *Ch. Pr.* (2d ed.) 231.

<sup>8</sup> 2 Dan. *Ch. Pr.* 211.

<sup>9</sup> No. 58, Lord Bacon's Ordinances.

As our equity rule makes no exception in the case provable by a court record or other documentary evidence, the truth of every plea filed in a federal court of equity should be verified by oath.<sup>10</sup>

**§ 864. All Defendants Must Verify Joint Answer.**

Where there are several defendants who join in one plea, each of the joint defendants should, if convenient, verify the answer. Equity rule 31 does not expressly provide for this case, but the analogy of the practice stated in the rule would appear to require an affidavit from each. If this is unduly expensive, or is impractical or inconvenient, and such fact is made to appear, the court has discretion to entertain a plea verified by one or more of the defendants.<sup>11</sup> Indeed there is some good authority to the effect that where several defendants are united in interest, a joint plea on their behalf need be verified by only one of them, and this is perhaps a better rule than that which would require all to swear to the answer.<sup>12</sup>

**§ 865. Verification of Corporate Answer.**

A plea of a corporation defendant should be verified by the oath of one of its officers. If a plea of a corporation is properly verified and certified in conformity with the equity rule, the circumstance that the corporate seal is not affixed to the plea is no ground of objection.<sup>13</sup>

**§ 866. Form of Statement in Affidavit.**

If the facts stated in the plea are averred of the defendant's own knowledge, or consist of acts done by himself, they must be sworn to positively. If they are acts done by others not necessarily within his knowledge, they need not be sworn to positively. It is sufficient if he swears to his belief of their truth; and this, more especially, where the plea is negative and denies some fact alleged affirmatively in the bill; as where the bill alleges that the complainant is heir, executor, or partner, and the plea denies that fact. The fact of citizenship,

<sup>10</sup> But Rule No. 8 of Rules of Circuit Court of First Circuit provides that if any plea consists in any part of matters of fact *dehors* the record, such matters of fact shall be supported by the affidavit of one of the defendants or of his attorney.

<sup>11</sup> *Computing Scale Co. v. Moore* (1905) 159 Fed 197.

<sup>12</sup> 22 Encyc. Pl. & Pr. 1033-4. *Com. v. Marion Phosphate Co. v. Cummer* (1893) 9 C. C. A. 279, 60 Fed. 873; *Re Simmons* (1874) Fed. Cas. No. 12,864.

<sup>13</sup> *Fayerweather v. Trustees* (1900) 103 Fed. 546.

which is made the basis of a plea to the jurisdiction, may be sworn to as on information and belief.<sup>14</sup>

### § 867. Effect of Failure to Verify.

Where a plea is not verified, the plaintiff may disregard it and take a *pro confesso*, as if such plea had not been filed.<sup>15</sup> But the defect incident to the absence of verification or an insufficient verification is waived by plaintiff's counsel setting the plea down for argument on its sufficiency.<sup>16</sup>

### § 868. Signature and Certificate of Counsel.

Like the answer, a plea must be signed by counsel, unless it is taken by commissioners appointed by the court to take the answer.<sup>17</sup> In addition to his signature, the counsel, or solicitor, is required by the equity rules to make a certificate to the effect that in his opinion the plea is well founded in point of law.<sup>18</sup>

### § 869. Plea in Propria Persona.

A plea in abatement to the jurisdiction of the court over the person of the defendant, which involves merely a question of personal privilege, must be put in by the defendant *in propria persona*. If such a plea purports to be put in by the defendant acting through his solicitor or attorney, this operates to defeat the plea; for it is said that the appointment of a solicitor by whom the plea is put in is an admission that the court has jurisdiction. This highly technical rule has been enforced a few times in the federal courts.<sup>19</sup> It does not now apply where the plea in abatement goes to the essential jurisdiction of the court, for under the existing statute this cannot be waived.

<sup>14</sup> *Ewing v. Blight* (1855) Fed. Cas. No. 4,590.

<sup>17</sup> 2 Dan. Ch. Pr. 210.

<sup>15</sup> *National Bank v. Ins. Co.* (1881) 104 U. S. 54, 76, 26 L. ed. 693, 702; *Sheffield v. Witherow* (1893) 149 U. S. 574, 37 L. ed. 853; *American Co. v. Union* (1896) 90 Fed. 598; *Computing Scale Co. v. Moore* (1905) 139 Fed. 197.

<sup>16</sup> *Kellner v. Mut. Ins. Co.* (1890) 43 Fed. 623; *Griswold v. Bacheller* (1897) 77 Fed. 857; *Cook v. Sterling Electric Co.* (1902) 118 Fed. 45; *Vacuum Oil Co. v. Eagle Co.* (1903) 122 Fed. 105; *Computing Scale Co. v. Moore* (1905) 139 Fed. 197; *Goodyear v. Foby* (1868) Fed. Cas. No. 5,585.

<sup>18</sup> Equity Rule 31; Rule 8 of Rules of the First Circuit; *Hatch v. Bancroft-Thompson Co.* (1895) 67 Fed. 802.

<sup>19</sup> *Van Antwerp v. Hulburd* (1870) 7 Blatchf. 426, Fed. Cas. No. 16,826; *Thayer v. Wales* (1872) 5 Fisher Pat. Cas. 448, Fed. Cas. No. 13,872; *Teasdale v. Rambler* (1794) Fed. Cas. No. 13,815; *Tease v. Phelps* (1855) Fed. Cas. No. 13,819.

The plea in *Scott v. Sandford* (1856) 19 How. 393, 15 L. ed. 691, was put in by the defendant *in propria persona*.

The rule is apparently restricted to situations involving the privilege of a defendant not to be sued in the particular court or district.

### § 870. Filing of Plea.

After the plea has been properly drawn, signed, verified, and certified, the next step is to file it. This is done by leaving the plea with the clerk of the court. It is the duty of this officer to receive the pleading, to mark it as filed, and to note the fact of the filing of the plea in the order book. This entry operates as notice to the plaintiff and his solicitor of the fact that the plea is filed.<sup>20</sup> If the clerk fails to note the filing of the plea in his order book, the plaintiff is not affected with constructive notice of the filing of the plea, and hence he is not subject to the penalty stated in rule 38 for failing to reply or set the plea for argument.<sup>21</sup>

### § 871. Time to Plead.

The time within which the defendant should properly put in his plea, not having demurred or answered, is limited by the rule day next succeeding that of entering the appearance.<sup>22</sup> But if no *pro confesso* has been taken against him for failure to plead, demur, or answer, within that period, the defendant may, of course, plead at any time before the bill is taken for confessed.

The putting in of a demurrer to the bill necessarily extends the time to plead until the demurrer may be disposed of,<sup>23</sup> if the court, on overruling the demurrer, sees fit to permit the defendant to plead.

The putting in of an answer operates to waive the right to plead altogether, unless for good cause shown the court sees fit to permit the answer to be withdrawn in order that a plea may be filed. After a plea has been ordered to stand for an answer, the court will not per-

<sup>20</sup> Equity Rule 4.

<sup>21</sup> *Newby v. Oregon Cent. R. Co.* (1870) 1 Sawyer, 64.

<sup>22</sup> Equity Rule 18. Rules of the circuit courts abridging this period cannot be given effect in equity causes. For instance, Rule No. 8 of the First Circuit requires that all pleas in abatement or to the jurisdiction shall be filed within two days after the return day of the writ. It is obvious that this rule cannot be applied in equity causes, because it is inconsistent with Equity Rule 18.

<sup>23</sup> Where a demurrer is interposed to a part only of a pleading at law or in equity it shall not be necessary then to

plead or obtain an extension of time to plead to the remaining parts, but the demurrer shall operate to extend the time to plead to the remaining parts; and the demurring party shall have the same time after the disposition of the demurrer to plead to said remaining parts, as he may have or obtain to plead to the parts demurred to; provided, that a demurrer to a part of a pleading shall exhaust the party's right of demurrer to such pleading, and he shall not be permitted to afterward demur to it or to any other part of it unless the pleading be amended. No. 14 of Rules of Circuit Court for N. D. California.

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mit an additional plea to be put in, unless good reason is shown why such step should be taken.

*Giant Powder Co. v. Safety Nitro Powder Co.* (1884) 10 Fed. 509: A plea having first been filed in a patent case, a stipulation was made by which the plea was to stand for an answer. In the course of taking testimony, the solicitor for the defendant became impressed with the importance of having the case decided on the plea as a plea, provided it was good, inasmuch as, if the merits were gone into, his client might be compelled to disclose the secrets of his composition. The point raised by the plea appeared to be new, and as the court thought there might be something in the plea, an order was entered relieving the defendant from the stipulation and permitting him to plead.

### *Argument of Legal Sufficiency of Plea.*

#### § 872. Testing Efficacy of Plea.

When a plea that is good in form has been put in within the proper time and under conditions allowable by the practice of the court, it becomes necessary for the plaintiff to consider the steps to be taken by himself in order to dispose of the plea. The plea may appear to be subject to attack on either of two grounds: (1) it may appear that the plea is insufficient in law to constitute a bar to the bill or to that part of it to which the plea is addressed; (2) it may appear that the matters of fact stated in the plea are untrue in point of fact. Corresponding with these two alternatives, the plaintiff has two lines of procedure. If he conceives that the plea is bad in law, he sets it down for argument on its sufficiency; if he conceives it to be false in fact, he puts in a replication to the plea, and a trial is had on the issue of the fact thus joined.<sup>24</sup> One or the other of these two alternatives must be pursued. If the plaintiff fails to set the plea down for argument or to reply to it, on or before the next rule day after the plea is filed, he is deemed to admit both the sufficiency and the truth of the plea, and his bill is thereupon dismissed as of course, unless the court allows further time.<sup>25</sup>

#### § 873. Demurrer to Plea.

A demurrer cannot be used to test the question of the legal sufficiency of a plea, as the demurrer to a plea is not in good form.<sup>26</sup> In

<sup>24</sup> *Rhode Island v. Massachusetts* (1840) 14 Pet. 210, 10 L. ed. 423; *Daniel v. Benedict* (C. C. A.; 1899) 38 C. C. A. 592, 97 Fed. 307, 373.

<sup>25</sup> Equity Rule 38.

<sup>26</sup> *Zimmerman v. So Relle* (C. C. A.; 1897) 80 Fed. 417, 25 C. C. A. 518; *Gallagher v. Roberts* (1906) 1 Wash. C. C. 320, Fed. Cas. No. 5,194.

*In Stead v. Course* (1898) 4 Cranch

equity pleading demurrers are used to test the legal sufficiency of the bill only, and properly they are not used in connection with any other pleading. However, a demurrer to a plea has sometimes been loosely treated as equivalent to a rule setting the plea down for argument on its sufficiency,<sup>27</sup> in which case an order overruling the demurrer is equivalent to an order sustaining the plea.<sup>28</sup> On the overruling of a demurrer to a plea so filed and so entertained, the plaintiff should be permitted to reply to the plea, and a refusal of such permission is reversible error.<sup>29</sup>

Where a demurrer to a plea is entertained at all, it will be treated as reaching to the sufficiency of the bill as well as to the sufficiency of the plea. In other words, according to the analogy of the practice at law, the demurrer is considered a general fault-finder, and it reaches back to the first defective pleading.<sup>30</sup>

#### § 874. Motion to Quash for Legal Insufficiency.

A motion to quash a plea for legal insufficiency is not a proper proceeding by which to test the sufficiency of a plea, though, if otherwise unobjectionable, such a motion may perhaps, like the demurrer, be treated as an informal setting down of the plea for argument.<sup>31</sup>

#### § 875. Motion to Strike Informal Plea.

If a plea is not properly filed, for instance, if it is lacking in the requisite formality or if the time allowed by the court for filing the plea has expired, or if any other prerequisite condition has not been complied with, the proper procedure on the part of the plaintiff is to move to strike it from the files.<sup>32</sup> On such a motion, the sufficiency

403, 2 L. ed. 660, there is a suggestion that an insufficient plea may be demurred to, but this is dictum.

In Rule No. 20 of Rules of Circuit Court for N. D. California, it is provided that "there shall be no demurrer to a plea; but within ten days after service thereof, the plea shall either be set down for argument or issue shall be joined thereon by a general replication thereto."

<sup>27</sup> *MacVeagh v. Denver, etc. Co.* (C. C. A.; 1897) 29 C. C. A. 33, 85 Fed. 74 (1901) 107 Fed. 18; *Goodyear v. Toby* (1898) 6 Blatchf. 130; *Lester v. Stevens* (1892) 29 Ill. 161.

<sup>28</sup> *Zimmerman v. So. R.R.* (1897) 25 C. C. A. 518, 80 Fed. 417.

<sup>29</sup> *MacVeagh v. Denver, etc. Co.*

(1897) 29 C. C. A. 33, 85 Fed. 74; *United States v. Dallas Mill Road Co.* (1891) 140 U. S. 599, 616, 35 L. ed. 560, 563.

<sup>30</sup> *Goodyear v. Toby* (1898) 6 Blatchf. 130; *Beard v. Bowler* (1896) 2 Bond 13; *Griswold v. Bacheller* (1897) 77 Fed. 857.

<sup>31</sup> See *Hatch v. Bancroft-Thompson Co.* (1895) 67 Fed. 802.

<sup>32</sup> But as already stated, where the defect or informality of the plea consists of a failure on the part of the defendant to comply with Equity Rule 31 in regard to the certificate and verification, the plea may be wholly ignored, and a *pro confesso* may be taken, as if the plea had not been put in at all. See *ante*, §§ 867, 868.



of the plea as a matter of law, and considered as a defense to the cause of action stated in the bill, cannot be considered. The legal effectiveness of the plea can be tested only by setting it down for argument. On a motion to strike, the only question is whether the plea is properly filed. Whether it be good or bad in substance is immaterial.<sup>33</sup>

#### § 876. Setting Plea for Argument.

A plea is usually set down for argument by the plaintiff. It could possibly also be set down for argument by the defendant; but under the equity rules the duty of taking the initiative here is cast on the plaintiff, and it is to the interest of the defendant to let the matter rest until the plaintiff has acted, or failed to act, within the time required.<sup>34</sup>

A plea is regularly set down for argument by entering, or procuring the clerk to enter, in the order book, a statement that, on the motion of the plaintiff, the plea is set for argument on its sufficiency. This rule or order is entered as of course; and the entry on the order book is sufficient notice to the defendant, unless other notice is required by the practice of the particular court.<sup>35</sup>

By common usage of the various courts, a written notice of such steps as this is, it seems, usually served on the opposing solicitor, the particular practice of each court in this respect depending somewhat on the analogy of the practice in the state courts. Even though special notice is commonly required by the local practice, such notice is unnecessary where a plea is heard on its sufficiency in term time and the opposing solicitor is present. Out of term time a plea can be heard on argument on a rule day, if the requisite notice has been given.<sup>36</sup>

The failure of a clerk to make the proper clerical entry setting a plea for hearing on its sufficiency, when he is requested to do so by the plaintiff, is not material, where the adversary party has actual notice of the motion and both parties appear to argue the sufficiency of the plea at chambers. In such case the court will proceed to dispose of the plea as if the rule had been entered in due form.<sup>37</sup>

<sup>33</sup> *Armengaud v. Condert* (1886) 27 Fed. 247; *Kellner v. Mut. Life Ins. Co.* (1890) 43 Fed. 623. In *Switch Co. v. Philadelphia etc. R. Co.* (1896) 69 Fed. 833, the sufficiency of a plea was tested by means of a motion to strike the plea from the files; but this is bad practice.

<sup>34</sup> Equity Rule 38.

<sup>35</sup> Equity Rule 4.

<sup>36</sup> *Gordon v. St. Paul Harvester Works* (1885) 23 Fed. 147.

<sup>37</sup> *Computing Scale Co. v. Moore* (1905) 139 Fed. 197.

### § 877. Argument of Plea.

Hearing of argument on the sufficiency of a plea filed by defendant will be postponed by the court until a demurrer filed by another defendant has been disposed of, where it appears that, owing to the state of the pleadings, this is a convenient and satisfactory course to pursue.<sup>38</sup>

The right to open and conclude the argument, when a plea is heard on the question of its sufficiency, is with the party who put in the plea, and not with the plaintiff who sets the plea for hearing.<sup>39</sup>

### § 878. Waiver of Right to Argue Plea.

The right to argue a plea on its legal sufficiency is waived by excepting to the sufficiency of an answer accompanying the plea and going to hearing on such exception. Consequently if a plaintiff sets a plea for argument and at the same time excepts to the sufficiency of the answer, the right to argue the plea is waived.<sup>40</sup>

Where a plea is filed to a bill and afterwards another plea is filed to the amended or supplemental bill in the same cause, the later plea supersedes the former, and on argument of sufficiency the earlier plea need not be taken into account.<sup>41</sup>

### § 879. Truth of Plea Admitted.

Where the plaintiff, instead of replying to a plea, sets it down for argument on the question of its sufficiency, the facts stated in the plea are, at the hearing, taken to be true. But the legal conclusions insisted upon in the plea are not considered as admitted.<sup>42</sup> The admission implied from setting the plea for argument extends only to the facts well pleaded.<sup>43</sup> The only question that can be raised on the argument of a plea is this: Does it show facts sufficient to constitute a good defense? <sup>44</sup> In considering this question the court looks only to the averments of the plea. The truth of the plea is not in

<sup>38</sup> *Campbell v. Mayor etc. New York* (1898) 33 Fed. 795.

<sup>39</sup> *Rhode Island v. Massachusetts* (1840) 14 Pet. 210, 10 L. ed. 423.

<sup>40</sup> *Hatch v. Bancroft-Thompson Co.* (1895) 67 Fed. 802.

<sup>41</sup> *Missouri etc. R. Co. v. Texas etc. R. Co.* (1892) 50 Fed. 151.

<sup>42</sup> *United States v. Dalles Military Road Co.* (1891) 140 U. S. 599, 35 L. ed. 560; *Farley v. Kittson* (1887) 120 U. S. 303, 30 L. ed. 684; *State of Rhode Is-*

*land v. State of Massachusetts* (1840)

14 Pet. 210, 10 L. ed. 423; *Hatch v. Ban-*

*croft-Thompson Co.* (1895) 67 Fed. 802;

*Metcalf v. Am. School, etc. Co.* (1903)

122 Fed. 115; *General Electric Co. v.*

*New England etc. Co.* (1904) 128 Fed.

738, 63 C. C. A. 448.

<sup>43</sup> *Schnauffer v. Aste* (1906) 148 Fed.

867.

<sup>44</sup> See *Kellner v. Mut. Life Ins. Co.*

(1890) 43 Fed. 823.

issue and the court will not even look to the recitals of its own records.<sup>45</sup> By setting a plea down for argument, the plaintiff admits its truth but denies its sufficiency. The legal effect is substantially the same as if the cause were heard on a demurrer to the plea, considering that practice available.<sup>46</sup>

### § 580. Assumption as to Truth of Matters Stated in Bill.

In deciding on the sufficiency of a plea, at the argument, the bill is also assumed to be true so far as it is not contradicted by the plea.<sup>47</sup> By putting in his plea the defendant admits as true all the facts alleged in the bill that are ~~not denied in the plea.~~<sup>48</sup>

### § 581. Scope of Plea.

It is not necessary that a plea should go to the whole bill. If it covers a distinct part of the bill and shows a good defense as to that, it is sufficient.<sup>49</sup>

A plea that goes to the whole bill but which is addressed to a single defense need not deny other allegations of the bill than such as are connected with the particular defense relied on in the plea.

*Sims v. Lyle* (1822) 4 Wash. C. C. 301, Fed. Cas. No. 12,891: The case was heard on a motion to overrule the plea because it did not admit or deny all the facts stated in the bill; neither was it accompanied by an answer denying those facts. The plea, however, covered the whole subject to which it applied, and if the matter stated was good in substance and true in fact, it was clear that the whole bill must be dismissed. It was held that the plea need not deny other allegations of the bill than such as pertained to the defense raised by the plea. Said Mr. Justice Washington: "A plea being nothing more than a special answer to the bill, setting forth and relying upon some one fact, or a number of facts, tending to one point, sufficient to bar, delay, or dismiss the bill, it would be a vice in the plea to cover any other parts of the bill than such as concern the particular subject of the bar, its office being to reduce the cause, or some part of it, to a single point, and thus to prevent the expense and trouble of an examination at large. It is true that all facts essential to render the plea a complete defense to the bill, so far as the plea extends, must be averred in it, or it will be no defense at all."<sup>50</sup>

<sup>45</sup> *Harrison v. Rowan* (1818) Fed. Cas. No. 8,140.

<sup>46</sup> *Burrell v. Hackley* (1833) 35 Fed. Cas. 833; *Daniels v. Benedict* (1899) 97 Fed. Cas. 387, 38 U. C. A. 592.

<sup>47</sup> *McClaskey v. Barr* (1839) 36 Fed. Cas. 185, 171.

<sup>48</sup> *General Electric Co. v. Bullock Electric Mfg. Co.* (1905) 138 Fed. 412.

<sup>49</sup> *Beard v. Bowler* (1806) Fed. Cas. No. 1,186; *Kirkpatrick v. White* (1826) Fed. Cas. No. 7,856; *Platt v. Oliver* (1837) Fed. Cas. No. 11,114.

### § 882. Plea Good in Part Only.

A plea may be good in part and bad in part; that is, it may exhibit a good defense to part of the bill yet not as to all that part covered by the plea. Where such appears to be the case, the plea will be upheld as to the part of the bill to which it shows a good defense, and will be overruled as to the other.

Thus, if a bill is filed for an accounting, and the defendant relies on a release covering transactions prior to a particular day, and his plea setting up the release is so drawn as to include transactions subsequent to the time covered by the release, the plea may yet be allowed as to the transactions actually covered by the release.<sup>50</sup> It will be noted that the principle here stated as applicable to pleas is different from that relating to a demurrer, for a demurrer that is bad in part is wholly bad.

The rule that a plea may be allowed in part and disallowed in part must be understood with reference to its extent; that is, with reference to the quantity of the bill covered by it, and not the ground of defense offered by it. If any part of the defense made by a plea is bad, the whole must be overruled. The court will not attempt to separate a single defense into its component elements, allowing the good and disallowing the bad; but will overrule the whole defense as bad.<sup>51</sup> In rare instances a court might haply be disposed to ignore a part of a plea setting up a bad defense, or treat it as surplusage.<sup>52</sup>

### *Order of Court in Disposing of Plea.*

### § 883. Order Sustaining Plea—Right of Plaintiff to Amend or Reply.

If a plea on argument of its sufficiency is ruled to be sufficient in law to bar the recovery of the plaintiff, it is permissible, under the uniform practice of the court, for the plaintiff to amend; or he may, by replication, put in issue the facts stated in the plea.<sup>53</sup> The usual order is that the plea "be allowed." The plaintiff may then amend or reply to the plea and go to trial on the issue of fact. This he is entitled to do as a matter of course.<sup>54</sup> It is erroneous for the court to

<sup>50</sup> *Roche v. Morgell* (1899) 2 Sch. & 485; *Huntington v. Laidley* (1897) 79 Lef. 725; *Duncalf v. Blake* (1737) 1 Fed. 806. The latter case concerned an Atk. 52; *Huggins v. Buildings Co.* answer in support of a plea.

(1740) 2 Atk. 44; *Kirkpatrick v. White* (1828) 4 Wash. C. C. 595, Fed. Cas. No. 7,850, *Rhino v. Emery* (1897) 79 Fed. 435. <sup>51</sup> *Rhode Island v. Massachusetts* (1840) 14 Pet. 257, 10 L. ed. 445.

<sup>52</sup> *Rhode Island v. Massachusetts* (1840) 14 Pet. 210, 257, 10 L. ed. 423, 445; *Zimmerman v. So Relle* (1897) 80 Fed. 417, 25 C. C. A. 512.

<sup>53</sup> 2 Dan. Ch. Pr. 107

dismisses the bill peremptorily without permitting the plaintiff to take issue on the plea.<sup>55</sup>

*United States v. Dallas Mil. Road Co.* (1891) 140 U. S. 599, 35 L. ed. 560: Bill in equity by the United States to procure a decree of forfeiture of lands and a cancellation of patents. By leave of the court two pleas were filed. The circuit court held the pleas to be good and entered an order dismissing the bill without leave to the plaintiffs to reply and try the case on the issue tendered by the plea. This was held to be erroneous. The trial court has no discretion in such a matter, and the fact that, on careful consideration, it may appear to the court that expense and the annoyance of long and fruitless litigation may be avoided by dismissing the bill—as the trial court thought in this case—cannot vindicate such a course.<sup>56</sup>

#### § 884. Effect of Decree as Res Judicata.

The judgment of a court sustaining a plea on argument becomes *res judicata* in that case and is controlling on the court until reversed.<sup>57</sup> So, when a plea is heard on argument of its sufficiency on appeal, and a decree is entered in the supreme court adjudging the plea to be good in law, the sufficiency of the plea is *res judicata*, so far as that litigation is concerned; and the cause being remanded to permit a replication and trial of the issue raised by the plea, the question of the legal sufficiency of the plea cannot be reopened.<sup>58</sup>

#### § 885. Order Overruling Plea—Duty of Defendant to Answer.

If, for any reason, the court deems a plea to be bad in point of law so that it does not constitute a bar to the bill or to that part of the bill to which it is addressed, an order is entered adjudging the plea

<sup>55</sup> It is provided by Equity Rule 33 that the plaintiff may set down a plea to be argued, or may take issue upon it. This does not mean that the plaintiff is to make thereby such a conclusive election that, if he sets down the plea to be argued and it is sustained on the argument, he cannot afterwards take issue on it. By rule 34, on the overruling of a plea on argument of its sufficiency, the defendant has a right to answer the bill. The object of having a plea set down for hearing is to induce the presentation to the court, as a question of law, of the matters set up in the plea, so that, assuming those matters to be true in point of fact, the whole controversy may be determined as a question of law. But this practice would be discouraged if the plaintiff were not to be allowed, in case the plea is sustained in

point of law, to take issue upon it as matter of fact. Rule 35 provides that, in case upon a hearing a plea is allowed, the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill. But there is no restriction put upon the right of the plaintiff to take issue upon a plea after it is allowed on argument. Such is the view adopted by the supreme court. *Wooster v. Blake* (1881) 7 Fed. 816, affirmed *Clark v. Beecher Mfg. Co.* (1885) 115 U. S. 79, 29 L. ed. 352.

<sup>56</sup> *Reversing U. S. v. Dallas Mil. Road Co.* (1890) 41 Fed. 493.

<sup>57</sup> *Montgomery v. McDermott* (1900) 99 Fed. 503.

<sup>58</sup> *United States v. California etc. Co.* (1893) 148 U. S. 31, 38, 37 L. ed. 354, 358.

to be insufficient and overruling it. At the same time an order is entered assigning the defendant to answer the bill, or so much thereof as is covered by the plea, on or before the next rule day or within such other period as the court thinks proper consistently with justice and the rights of the defendant.<sup>59</sup>

When a plea has been overruled, the defendant must answer within the period fixed by the rules unless he gets an extension of time.<sup>60</sup> The fact that he files an application for leave to put in an amended plea will not save him from the penalty of failing to answer. The court can allow a *pro confesso* against him at the proper time regardless of the pendency of his application.

*McGregor v. Vermont Loan etc. Co.* (C. C. A.; 1906) 104 Fed. 709, 44 C. C. A. 146: Upon the overruling of a demurrer, the defendant was given sixty days to answer. This period having passed without an answer, the defendant filed a plea in abatement, which was overruled. This gave him further time to answer, i. e., until the next rule day. Instead of answering within this period, the defendant filed an application for a "rehearing" on the plea for leave to file an amended plea in abatement. The plaintiff caused this application to be set for hearing on the next rule day, which was also the limit of the time allowed for defendant to answer. At this rule day, no answer being filed, the plaintiff moved for a *pro confesso* and the cause was heard both on this motion and on the defendant's application. The court refused the defendant's application and permitted a *pro confesso* to be taken.

### § 886. Costs.

An equity rule provides that, upon the overruling of a plea, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant had good ground in point of law or fact to interpose the same, and that it was not interposed vexatiously or for delay.<sup>61</sup> Where matter presented by the plea is such that it may reasonably be considered, by the solicitor filing the plea, to be good, although he be mistaken, and the plea is filed in good faith, and not vexatiously or for delay, costs should not be taxed in favor of the plaintiff. The rule is not susceptible of any other construction; for if it should be held to mean that the court must be

<sup>59</sup> Equity Rule 34.  
No. 20 of Rules of Circuit Court for N. D. California provides that if a plea be set down for argument and overruled the party putting in the plea shall have as of course and without special leave of the court ten days after service of written notice of the decision in which to put in his answer.

<sup>60</sup> A plea to a part of a bill or petition shall have the same effect as an extension of time to answer to the remaining parts of the bill. No. 20 of Rules of Circuit Court for N. D. California.

<sup>61</sup> Equity Rule 34.

satisfied that the plea is good in law or fact, as the case may be, the rule could have no operation, as the plea would not be overruled.<sup>62</sup>

### § 887. When Matter of Plea Not Available in Answer.

Defensive matter embodied in a plea that has been overruled cannot be set up again in the answer; and if it be incorporated in the answer, it is subject to be stricken on exception taken.<sup>63</sup> A defendant often has, especially under equity rule 39, a right to elect whether he shall make his defense by plea in bar or answer, but when he elects to plead, the judgment on the plea becomes *res adjudicata* in that case.<sup>64</sup> The rule is different where the order overruling the plea expressly saves the right of the defendant to rely in his answer on the matter of the plea.

### § 888. Judicial Discretion in Disposing of Pleas.

The danger of injustice arising from the use of pleas gives rise to an equitable discretion in relation to them, which the court of equity exercises freely, when it sees proper to do so. In many cases where pleas are not overruled, the court will not permit them to have full effect; and the court will, in some cases, save to the defendant the benefit of the plea at the hearing. In other cases, the court will order the plea to stand for an answer, or enter an order that the plea may be embodied in the answer.<sup>65</sup>

### § 889. Leave to Rely on Plea in Answer.

If the issue presented by the plea is of such nature that it could more properly be determined after answer and at the final hearing, the plea will be overruled always, with leave to rely on the same in the answer.<sup>66</sup> In such case the defendant is required to answer, in order that the whole suit may be determined on its merits.<sup>67</sup>

<sup>62</sup> *Chisholm v. Johnson* (1898) 84 Fed. 384.

<sup>63</sup> *Miller v. Rickey* (1906) 146 Fed. 576; *Sharon v. Hill* (1885) 26 Fed. 341.

No defense which has been made and disposed of in a plea shall be renewed in the answer, and if so renewed it shall be stricken out or disregarded. No. 20 of Rules of Circuit Court for N. D. California.

<sup>64</sup> *Pentlidge v. Pentlidge* (1864) 22 Fed. 412.

<sup>65</sup> *Rhode Island v. Massachusetts* (1840) 14 Pet. 257, 10 L. ed. 445.

<sup>66</sup> *Rejall v. Greenwood* (1883) 60 Fed. 764; *Chisholm v. Johnson* (1898) 84 Fed. 384; *Dobson v. Peck Bros. & Co.* (1900) 103 Fed. 904.

<sup>67</sup> *Bailey v. Wright* (1863) 2 Bond 181. Fed. Cas. No. 749.

### § 890. Order Granting Leave Should Be Express.

If the court overrules a plea on the idea that the defense stated in it is one that ought more properly to be made by answer, the order overruling the plea should expressly reserve to the defendant the right to embody the matter of such plea in the answer, for the general rule is that matter contained in an overruled plea cannot be set up again in the answer. However, if the matter of the plea should be set up in the answer without an express order of the court to that effect, it would apparently be necessary for the plaintiff, in order to get the benefit of the irregularity, to except to the answer for impertinence, otherwise the defect would be waived. It seems that matter of an overruled plea can be set up in the answer, without an express order to that effect, where the court overrules the plea on the particular ground that the defense contained in it ought to be made by answer. The effect of the decision in such case is to recognize the right by necessary implication.<sup>68</sup>

### *Trial of Issue on Plea and Replication.*

#### § 891. Replication to Plea.

A plaintiff who desires to controvert the truth of the facts set forth in a plea must file a replication on or before the rule day next succeeding that on which the plea was filed.<sup>69</sup> The replication to the plea in equity is borrowed, like the plea itself, from the common-law system of pleading. Its object is to traverse the plea and make an issue on the question of fact.<sup>70</sup>

#### § 892. Special Replication Obsolete.

By the practice of courts of equity special replications have long been disused, and this applies to replications to pleas as well as to replications to answers. To be sure, equity rule 45, abolishing special replications, refers in terms only to special replications to answers; but apart from the rule, equity practice is against special replications

<sup>68</sup> This appears to have been the case in *Computing Scale Co. v. Moore* (1905) 189 Fed. 187, though no particular notice was taken of the matter.

<sup>69</sup> Equity Rule 38.

<sup>70</sup> A general replication in the form of the usual general replication to an

answer substituting the word "plea" for the word "answer" will suffice as a general replication to a plea. As to the propriety of this form of replying, see *Matthews v. Lalancette & Co.* (1880) 2 Fed. 232.



of all sorts. A special replication to a plea is therefore in bad form, and will be stricken out on motion.<sup>71</sup>

### § 893. Matter of Special Replication Must Be Plead in Bill.

As a special replication is not available in such a situation, the plaintiff must, in order to get the benefit of the matter in avoidance of the plea, ask leave to amend. This application being granted, the plaintiff adds an amendment to his bill in which he charges that the defendant relies on a certain pretended defense, as for instance, on a release, but that the release in question is invalid because of mutual mistake. The practice in regard to this matter is precisely the same as if the defense had been set up by answer.

It is to be remembered that the abolition of special replications does not in any degree modify the general principle that relief can never be granted except upon matters duly set forth in the pleadings on the record. For instance, if a plea sets up a release, the plaintiff cannot at the hearing have the benefit of proof tending to show that the release was executed under a mutual mistake, unless that matter in avoidance of the release is, in some proper way, specially pleaded by him. A general replication to the plea will not suffice.<sup>72</sup>

### § 894. Replication Admits Legal Sufficiency of Plea.

The replication to a plea in equity puts the substance of the plea in issue, and formerly by the established practice of the English chancery a plaintiff who had put in a replication could not thereafter take advantage of the defective form or legal insufficiency of the plea. By filing a replication instead of setting the plea down for argument, the plaintiff admitted the formality and sufficiency of the plea.<sup>73</sup> "Replying to the plea is always considered as full an admission of its validity as if it had been allowed upon argument."<sup>74</sup>

This principle has been modified, so far as the federal courts are concerned, by the adoption of equity rule 33, which provides that when a plea is found true on the issue of fact it can avail the defendant only so far as in law and equity it ought to avail him. The effect of this is to abolish, in a measure, the ancient rule by which the filing of a replication operated as a waiver of all objection to the sufficiency of the plea.<sup>75</sup>

<sup>71</sup> *Mason v. Hartford etc. Co.* (1882) 10 Fed. 334.

<sup>72</sup> *Horn v. Detroit Dry Dock Co.* (1893) 150 U. S. 610, 626, 37 L. ed. 1199, 1203.

<sup>73</sup> *Stead v. Course* (1808) 4 Cranch 403, 2 L. ed. 660.

<sup>74</sup> 2 Dan. Ch. Pr. 220.

<sup>75</sup> For a discussion of the effect of this rule, see *post*, § 900.

### § 895. Proof and Trial of Issue.

After replication to a plea the parties proceed to take proof on the issue of fact presented by the plea exactly as in case of a replication to an answer.<sup>76</sup> Where the question of statutory jurisdiction is raised by plea, it is treated as a separate and independent issue;<sup>77</sup> and while this issue may and should be separately tried, the action of the court in disposing of it, for instance, in overruling the plea on the proof, will not be given the technical effect that formerly followed from disposing of a plea in abatement.<sup>78</sup>

At the hearing on plea, replication, and proof, nothing is in issue but the truth of the matter pleaded.<sup>79</sup> The question whether the plea ought to have been supported by an answer is not to be considered. That point should be raised by setting the plea down for argument.<sup>80</sup>

### § 896. Burden of Proof.

On the issue of fact the burden is on the defendant to sustain his plea by proof, if the plea is an affirmative one;<sup>81</sup> if the plea is negative, the burden of proof is on the plaintiff to establish the facts controverted by the plea.<sup>82</sup> If issue is taken on an anomalous plea, each party has something to prove: the defendant, his affirmative defense; and the plaintiff, the affirmative matter controverted by the negative part of the anomalous plea.<sup>83</sup>

### § 897. Evidence at Trial of Issue.

A plea in equity, though sworn to, does not, like the answer, furnish any evidence as to the truth of the matters stated in the plea.<sup>84</sup> However, an allegation in a plea may, on the trial of the issue of fact,

<sup>76</sup> *Reisner v. Anness* (1877) 13 Off. Gaz. 7, Fed. Cas. No. 11,687.

<sup>77</sup> *Hartog v. Memory* (1886) 116 U. S. 588, 29 L. ed. 725; *Farmington v. Pillsbury* (1885) 114 U. S. 138, 29 L. ed. 114; *Refining Co. v. Wyman* (1889) 3 L.R.A. 503, 38 Fed. 574; *Ashley v. Board* (1893) 60 Fed. 55, 8 C. C. A. 455; *Terry v. Davy* (1901; C. C. A.) 107 Fed. 50, 46 C. C. A. 141.

<sup>78</sup> *Reavis v. Reavis* (1900) 101 Fed. 19.

<sup>79</sup> *United States v. California & Oregon Land Company* (1893) 148 U. S. 31, 37, 13 Sup. Ct. 458, 37 L. ed. 354, 358; *Dalzell v. D. W. Case Mfg. Co.* (1893) 149 U. S. 317, 315, 13 Sup. Ct. 880, 37 L. ed. 749, 751; *Appleton v. Marx* (1894) 62 Fed. 638, 10 C. C. A.

555; *Harts v. Cleveland Block Co.* (1899) 95 Fed. 682, 37 C. C. A. 227; *Bean v. Clark* (1887) 30 Fed. 225; *Eveleth v. Southern Cal. R. Co.* (1903) 123 Fed. 836; *Vacuum Oil Co. v. Eagle Oil Co.* (1907) 154 Fed. 867.

<sup>80</sup> *Farley v. Kittson* (1887) 120 U. S. 303, 317, 30 L. ed. 684, 689.

<sup>81</sup> *Stead v. Course* (1808) 4 Cranch 403, 2 L. ed. 660; *American Graphophone Co. v. Leeds* (1905) 140 Fed. 981.

<sup>82</sup> *Vacuum Oil Co. v. Eagle Oil Co.* (1907) 154 Fed. 867; *Ord v. Huddleston* (1775) Dick. 510.

<sup>83</sup> *Langdell, Eq.* PL 101.

<sup>84</sup> *Farley v. Kittson* (1887) 120 U. S. 303, 30 L. ed. 684; *Gernou v. Boccacine* (1808) 2 Wash. C. C. 199, Fed. Cas. No. 5,366.

be taken as an admission sufficient to fix liability on the defendant, though it cannot serve him as evidence of the truth of the plea.<sup>85</sup> Mere *ex parte* affidavits are of course not available as evidence on the trial of a plea, especially where no notice was given to the adverse party of the taking of the affidavit.<sup>86</sup>

The allegations of the bill, in so far as they are not denied by the plea, are assumed to be true at the trial of the issue made by the plea and replication.<sup>87</sup>

### § 898. Proof Necessary on Issue Raised by Plea.

As to the amount of evidence necessary to establish the truth of a plea in bar, the ordinary canon prevails; and a preponderance of proof sufficient to generate conviction on the question of the truth of the plea is enough. That is to say, on the issue of the truth of the plea, the court will accept it as proved on the same evidence that would be sufficient if the same defense were set up in the answer. So long as the old rule of practice prevailed that the bill must always be dismissed when the issue of fact tendered by a plea is found in favor of the plea, a concomitant principle was recognized that strict proof must be made of the facts stated in the plea; and it was not enough, to support a plea, to prove less than or something different from that which the plea alleged. Now that, by equity rule 38, a plea is permitted to avail a defendant only so far as it should in equity avail him, it would seem to follow as a necessary consequence that the same strictness of proof should not be required in establishing the plea. Accordingly we find no intimation in current decisions that the rule in respect to the amount of proof necessary to establish the truth of a plea is in any respect different from that which prevails in other situations. But of course if any substantial averment in the plea is not proved, the plea will be overruled.<sup>88</sup>

#### *Plea Established by Proof.*

### § 899. Effect of Finding in Favor of Plea—Former Practice.

If the issue of fact is found in favor of the defendant, that is, if the plea is found to be true, the defendant is, on general principles of equity pleading and practice, entitled to a dismissal of the bill;<sup>89</sup>

<sup>85</sup> Kennedy v. Cresswell (1879) 101 U. S. 641, 25 L. ed. 1075. <sup>86</sup> McCloskey v. Barr (1889) 38 Fed. 165.

<sup>87</sup> Lillenthal v. Washburn (1891) 8 Fed. 707. <sup>88</sup> Elgin Wind Power etc. Co. v. Nichols (C. C. A.; 1895) 12 C. C. A. 573.

<sup>89</sup> Farley v. Kittson (1887) 120 U. S. 317, 30 L. ed. 689, 7 Sup. Ct. 534; <sup>90</sup> Farley v. Kittson (1887) 120 U. 65 Fed. 215.

and this without reference to any equity arising from other facts stated in the bill and without reference to the substance of the plea itself. Such is the rule of English chancery practice, which also formerly prevailed in the federal courts. Under this doctrine if a plea was replied to and its truth was tried on the issue thus joined, the substance of the plea was wholly immaterial. If the plea was found true, the bill was dismissed as a matter of course. The plea might be totally irrelevant in point of substance and entirely insufficient in law, yet in theory this made no difference. By filing his replication and taking issue on the truth of the plea, the plaintiff admitted its sufficiency as a bar to the bill.

*Hughes v. Blake* (1821) 6 Wheat. 453, 5 L. ed. 303: In this case, the issue joined on the plea was found in favor of the defendant. The bill was dismissed. The court observed that replying to a plea is an admission of its sufficiency as much as if its sufficiency had been determined on argument. Therefore, when a plea is found true dismissal follows without reference to the substance of the plea. This was "the long and established practice of the court of equity, which ought not lightly to be departed from." And it was added: "If a replication should be filed inadvertently, the court would have no difficulty in permitting it to be withdrawn. But if the plaintiff will persevere in putting the defendant to the trouble and expense of proving his plea, it must be from an entire conviction that it contains a substantial defense, and in such case there is no hardship in a court's considering it in the same light."

#### § 900. Equity Rule Changes Prior Practice.

This decision presently led to the adoption of an equity rule changing the doctrine stated in that case. In the very next year the supreme court promulgated a rule declaring that "if upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him."<sup>20</sup>

This rule has been brought down as rule 33 in the series of rules now in force. It clearly takes from the establishment of the plea the effect it had under the old law. Under the existing rule the court may on final hearing do about what might formerly have been done where the benefit of the plea was saved to the hearing. The decision of the court does not, under this rule, rest entirely upon the truth of the plea, but the court is at liberty to determine, under the pleadings and evidence, the relief to which the respective parties are entitled.

S. 303, 314, 30 L. ed. 684, 688, 7 Sup. ed. 660; *Daniels v. Benedict* (1829) 33 Ct. 534; *Rhode Island v. Massachusetts* C. C. A. 592, 97 Fed. 367. (1840) 14 Pet. 257, 10 L. ed. 445; *Stead* <sup>20</sup>Equity Rule 19 of series of 1822, v. *Course* (1808) 4 Cranch 403, 2 L. ed. 376. See 7 Wheat. x, 5 L. ed. 376.

Before a finding in favor of the truth of a plea can avail the defendant so far as to require the dismissal of the bill, it must appear that the plea is sufficient in law. If it is based on irrelevant facts, or is impertinent to the case made in the bill, or if it goes to only part of the relief sought, the bill will not be dismissed; but the plaintiff, notwithstanding the plea has been found against him, may have such relief as on the facts he may be entitled to. The insufficiency of a plea is therefore not now waived by going to trial on the plea.<sup>91</sup>

1. *Pearce v. Rice* (1891) 142 U. S. 28, 35 L. ed. 925, 12 Sup. Ct. 130: To a bill for equitable relief in respect to certain claims growing out of alleged gambling transactions, the defendants put in a plea and answer. The plea set up prior proceedings and a judgment at law as a bar. A replication was filed and the plea was found to be true. It was held that the plea was not so far conclusive as to require the suit to be dismissed; but inasmuch as the plaintiff appeared to be entitled to equitable relief, judgment to the extent of such relief was given in his favor.

2. *Soderberg v. Armstrong* (1902) 116 Fed. 709: Bill for injunction to prevent the defendant from extracting ore from a mining location. A plea in bar was filed setting up a previous adjudication. Issue was taken by general replication. It was insisted that by taking issue on the plea the plaintiff admitted its legal sufficiency, and as the record referred to in the plea was proved, it was insisted that the plea must be sustained. But it was overruled because insufficient.<sup>92</sup>

### § 901. Plea Sustained as to Part.

If a plea to the whole bill is not sustained as to the whole but only as to part of the bill, and as to the rest the plaintiff appears to be entitled to relief, the decree will be limited according as the circumstances indicate to be proper.<sup>93</sup>

### § 902. Practical Suggestion as to Disposition of Pleas.

From the fact that going to trial on the issue raised by a plea does not waive its legal sufficiency, the practitioner is not to infer that it

<sup>91</sup> *Butler Bros. Shoe Co. v. U. S. Rubber Co.* (1907) 156 Fed. 1; *Jones v. Hillis* (1900) 100 Fed. 355.

No. 20 of Rules of Circuit Court for N. D. California declares that if issue be joined upon a plea without having had it set down for argument, and the truth of the facts set up in the plea shall be proved, the court may nevertheless, in its discretion, allow the question of the sufficiency of the plea to be argued; and in any event the plea shall avail the party putting it in only so far as in law and in equity the facts proven ought to avail him.

<sup>92</sup> But where a plea is first formally set for argument on its sufficiency and sustained as sufficient by the court, and the plaintiff then files a replication and the plea is tried on the issue of fact, the question of the sufficiency of the plea is not available on appeal, no exception having been reserved to the action of the lower court in sustaining the plea on argument of its sufficiency. *Harts v. Cleveland Block Co.* (C. C. A.; 1899) 37 C. C. A. 227, 95 Fed. 691.

<sup>93</sup> *Earll v. Metropolitan Ry. Co.* (1898) 87 Fed. 528; *Matthews v. Lalance etc. Co.* (1890) 2 Fed. 232.

would always be safe for him to forego setting a defective plea down for argument on its sufficiency, with the expectation that after replying and going to trial on the issue raised by the plea, he could still have the benefit of the insufficiency of the plea even if the facts should be found against him. The situation that then arises is essentially different from that presented on the argument of the plea; and it can easily be perceived that a court might well hold a plea to be defective on argument of its sufficiency, which yet might be maintained as a good defense after the issue of fact is determined in favor of the plea. This would certainly hold as to all formal defects and objections to the certainty of the allegation.<sup>94</sup>

**§ 903. Court May Refuse to Try Issue on Immaterial Plea.**

Under the law as it now is, if a plea, clearly bad in substance, is replied to and proof is taken on this issue, the court, at the hearing on the plea, may in its discretion refuse to examine into the proof on the issue raised by the plea; for, seeing that it is bad in substance and therefore insufficient in law, a finding in favor of the defendant would not entitle him to have the bill dismissed. Such a state of facts once came before Blatchford, Circuit Judge, and he observed: "Even though the facts stated in this plea should be determined for the defendant, the proper disposition of this case would be to overrule the plea as bad in substance; therefore, the testimony taken on the issue need not be examined. The plea must be overruled and, under rule 34, with costs."<sup>95</sup>

**§ 904. When Plea Avails Defendant as Complete Defense.**

If a plea that has been found true on the trial of the issue of fact appears fully to meet all the equities of the bill and contains in fact and in substance a good defense to the suit, the defendant is entitled to judgment and the bill must be dismissed. In such case the plea caught in law and equity to avail the defendant as a complete defense, and accordingly it is given this effect.<sup>96</sup> So, if a plea is first set down for argument on its sufficiency and held good and then a repli-

<sup>94</sup> A plea which is in some respects objectionable for vagueness could, it seems, where no exception has been taken to its sufficiency, be maintained on issue and proof, provided the evidence should be sufficiently clear to cure the uncertainty of the plea. See *Hartz v. Cleveland Block Co.* (1899) 37 C. C. A. 227, 95 Fed. 681.

<sup>95</sup> *Matthews v. Lalance et al. Mfg. Co.* (1880) 2 Fed. 232, 235.

<sup>96</sup> *Horn v. Detroit Dry Dock Co.* (1893) 150 U. S. 610, 37 L. ed. 1199; *Rejall v. Greenwood* (1899) 35 C. C. A. 97, 92 Fed. 945; *Birdseye v. Helincr* (1895) 27 Fed. 239.

cation is put in and on proof the plea is found to be true in point of fact, nothing remains to be done but to dismiss the bill. The defendant cannot again controvert the legal sufficiency of the plea.<sup>87</sup>

There are many decisions made subsequent to the adoption of equity rule 33 which announce the general rule as still prevailing that if a plea is found true in fact the bill must be dismissed.<sup>88</sup> By replying to a plea, the plaintiff, so the formula runs, denies its truth but admits its sufficiency.<sup>89</sup> These utterances will be found on examination to contemplate the situation where the plea completely meets the case stated in the bill.

### *Plea Not Supported by Proof.*

#### **§ 905. Effect of Finding against Plea—Original Rule.**

The question next arises as to the disposition of the cause where the plea is found to be false, or is not sustained by the proof, on the trial of the issue of fact presented by the plea. Is the bill to be forthwith sustained and a decree entered in favor of the plaintiff for the relief prayed, or is the defendant who has pleaded the false or unsupported plea to be permitted to continue his defense by answering to the merits? There can be no doubt as to the original rule of equity practice applicable here. The only question is whether equity rule 34, as interpreted by the supreme court, changes that practice. By the settled rule of equity, as established in the English court of chancery and followed in all the equity courts of this country in the absence of a local regulation to the contrary, the defendant who has pleaded a plea and failed to substantiate it by proof at the hearing is effectually out of court, and a decree is entered in favor of the plaintiff without more ado. By putting in a plea the defendant admits the truth of the allegations of the bill not denied by the plea, and when the plea is found false or is unsupported in fact, the defendant's admission becomes conclusive, with the result that the suit is thereupon and thereby determined against him. The effect is substantially the same as if a *pro confesso* were entered. As, under the original rule of equity practice, the defendant was entitled to a dismissal when

<sup>87</sup> *Eveleth v. Southern Cal. R. Co.* 33 Fed. 50; *Jones v. Hills* (1900) 100 (1903) 123 Fed. 836. See *Harts v. Fed.* 355.

*Cleveland* (C. C. A.; 1899) 37 C. C. A. 227, 95 Fed. 681. <sup>88</sup> *Burrell v. Hackley* (1888) 35 Fed. 833; *Daniels v. Benedict* (1899) 97 Fed.

<sup>89</sup> *Myers v. Dorr* (1870) 13 Blatchf. 22, 28; *Cottle v. Kremenitz* (1885) 25 Fed. 494; *Birdseye v. Heilner* (1885) 20 Fed. 147; *Korn v. Wiebusch* (1887) 22, Fed. Cas. No. 9,988; *Gallagher v. Roberts* (1900) Fed. Cas. No. 5,194.

his plea was proved, so was the plaintiff entitled to a decree when the plea was disproved.

*Kennedy v. Croswell* (1879) 101 U. S. 641, 25 L. ed. 1075: A creditors' bill was filed against an executor and devisees seeking to subject land of the testator to the payment of a debt and seeking also an accounting as against the executor. The defendants pleaded that the executor had sufficient assets to satisfy all claims. After replication the issue was tried, and the plea was not sustained. A decree was entered in favor of the plaintiff as on a judgment *pro confesso*. In considering the effect of the finding on the issue of fact, the court said: "If a defendant plead a false plea, and it be so found, what is next to be done? Is it to be merely overruled, and an order made that he answer further, as in case of overruling a demurrer, or of overruling a plea for insufficiency? This is not the usual course. Having put the plaintiff to the trouble and delay of an issue, the defendant cannot, after it is found against him, claim the right to file an answer." Again, it was said: "If the plea is found to be false, it would seem to be just and equitable that the case should stand as if the defendant had admitted the allegations of the plaintiff;" and in the same connection, language of Sir Thomas Plummer was quoted: "Upon a plea found false the plaintiff is entitled to a decree."

It is to be observed of this case that it came up from a court of the District of Columbia, and the equity rules promulgated by the supreme court are not effective in that jurisdiction. Consequently, the discussion in this case must be construed in reference to the general principles of equity practice and not with reference to practice in the circuit courts under the equity rules.

### § 906. Effect of Equity Rule 34.

In the following cases the supreme court was required to pass on the practice to be followed in the circuit court when a plea is tried on the issue of fact and disproved. Here the effect of equity rule 34 is involved.

1. *Farley v. Kittson* (1887) 120 U. S. 303, 30 L. ed. 684: In this case three pleas were filed. One merely restated some facts alleged in the bill. A second plea set up lack of notice on the part of the defendant (who claimed as a *bona fide* purchaser for value). It is probable that this plea was insufficient in law and consequently that it would have been overruled if the plaintiff had set it down for argument; but the court did not decide this point. The third plea relied solely on matters of law apparent on the face of the bill. The plaintiff replied to all three pleas, and the case was heard on pleas and proof. The first plea was admittedly true, but it presented no defense and was disregarded. The second plea was found to be false in fact. The third plea was held to state matter not available by plea at all. Two of the pleas were thus adjudged to be clearly bad in substance, while the other (the second plea) was found to be untrue, or at least not proved. The supreme court held that the pleas should be overruled and that the defendant should be ordered to answer the bill. So far as the opinion in this case is concerned, the law was not stated differently from the principles expressed



in *Kennedy v. Creswell*, *supra*, yet the order made was different, for in the earlier case a decree was entered for the plaintiff when the issue raised by the plea was decided against the defendant, while in the present case the defendant was assigned to answer the bill under equity rule 34.

2. *Dalsell v. Dueber Mfg. Co.* (1893) 149 U. S. 315, 37 L. ed. 749: Bill in equity for injunction against the infringement of a patent. The defendant filed a plea setting up a contract whereby the equitable title to the patent was vested in the defendant. The plea was replied to, and at the hearing the evidence was found not to support it. The plea was overruled, and the defendant was ordered to answer the bill.

### § 907. Discussion of This Rule.

In these two cases the court expressly held, though without discussion, that a defendant who has failed on the trial of the issue made by plea and replication may proceed to answer. In view of the fact that the supreme court did not feel called upon to give the reasons for this practice, it may be well here to examine the equity rule in question to ascertain its import on this point. It will be noted that rules 33 and 34 are cognate rules. Both contemplate the disposition to be made of demurrers and pleas. As to pleas, rule 33 provides that they may be set down for argument or may be tried on the issue of fact. It also states the effect to be given to the plea when it is found to be true in fact. As to the effect to be given to the plea when it is found not to be established by proof, rule 33 is silent. That matter was apparently left to be dealt with in the next rule. Accordingly, in rule 34 we find this language: "Upon the overruling of any plea, the defendant shall be assigned to answer the bill." In the technical language of equity practice, "overruling" a plea is generally understood as referring to the overruling of a plea on argument of its sufficiency, and not as referring to the situation where the plea is disproved and overruled for that reason. It is, however, probable that the word is not here used in any such restricted and technical sense. Rule 34 apparently applies not only to the hearing of demurrers and pleas when the same are set down for argument, but also to the hearing of pleas on the issue of fact. If anything else were intended, it would have been easy to qualify the word "hearing" by limiting it to "hearing on argument." Besides, if the rule does not extend to a hearing on the issue of fact, why should the expression "in point of law or fact" be used in dealing with the question of costs? The interpretation whereby the rule is understood to apply not only to the hearing on argument but also to the hearing on the issue of fact, brings the rule into harmony with the second branch of rule 33 and establishes a principle as regards the

overruling of a plea on the issue of fact similar to that stated in rule 33 as regards the *sustaining* of the plea on the issue of fact. That is, the original principle of equity practice is changed as to both. The plea in other words is not now necessarily conclusive in either alternative. If the defendant prevails on the issue of fact, the plea avails him under rule 33 only so far as, in law and equity, it ought to avail him; if the plaintiff prevails on the issue of fact, the defendant is, under rule 34, permitted to answer. This is the reasoning which clearly underlies the practice sanctioned in those two cases by the supreme court.<sup>100</sup>

### § 908. Practice in Circuit Courts and Circuit Courts of Appeals.

In some of the circuit courts a practice has sometimes been followed<sup>101</sup> at variance with that indicated as correct in the two cases decided in the supreme court, to which we have referred above; but the circuit courts of appeals are now adhering to the practice followed by the supreme court, and all doubts as to the propriety of this practice ought therefore to be dismissed.

1. *Westervelt v. Library Bureau* (C. C. A.; 1902) 55 C. C. A. 436, 118 Fed. 894: To a bill to enjoin the infringement of letters patent for an invention, the defendant pleaded priority of invention by the person named in the plea. On proof the plea was not sustained. Thereupon an answer was filed without leave of the

<sup>100</sup> In what has been said above we have presented the considerations that support the practice followed by the supreme court in *Farley v. Kittson* and *Dalzell v. Duerber Mfg. Co.* When the full consequences of this practice are considered, it must sometimes appear to be wrong, and one is half inclined to insist that rule 34 was not intended to apply to the hearing of a plea on the issue of fact at all. The difficulty with that rule is that it undertakes to formulate the law applicable to the overruling of both demurrers and pleas in the same proposition. Answering to the bill follows as a necessary consequence from the overruling of a demurrer and from the overruling of a plea on argument, but not, under formally accepted doctrine, from the overruling of a plea on the trial of the issue. Evidently, before the rule should be construed to change the law on this latter point, its language should be so clear as to exclude doubt. But such is not here the case. Consequently it might appear, upon full analysis of the rule, that the

practice tacitly followed by the supreme court in those two cases does not embody the correct view of the rule.

However, in considering this matter, it must be remembered that we have to deal with the interpretation, not of a provision in any constitution or statute, but of a mere rule of practice promulgated by the supreme court. To subject the rule to too rigorous an analysis is clearly not worth while. It is enough to know that the supreme court has taken a particular view of its application. No practitioner, we suppose, need have any fears about following the practice indicated in those cases, for we apprehend that the court would not betray a confidence engendered by its own practice under its own rules. If the practice should prove undesirable it will be very easy for the court to promulgate a clearer rule.

<sup>101</sup> *Earl v. Metropolitan St. R. Co.* (1898) 87 Fed. 528; *Vacuum Oil Co. v. Eagle Oil Co.* (1907) 154 Fed. 867; *Elgin Wind Power etc. Co. v. Nichols* (1896) 12 C. C. A. 578, 65 Fed. 215.

court being first obtained. The plaintiff moved to strike. The motion was overruled, and an order was made that the answer be allowed to stand. This order had the same effect by retroaction as though the answer had been originally filed by special leave. On appeal it was held that the circuit court was right in allowing the defendant to answer. The opinion in this case contains the first serious attempt to settle the question in the light of the authorities.<sup>102</sup>

2. *Harris v. Cleveland* (C. C. A.; 1899) 37 C. C. A. 227, 95 Fed. 681: Bill to restrain infringement of a patent. The defendant pleaded a special contract setting up an equitable title to the patent. The plea was argued on its sufficiency and was adjudged bad. The defendant then amended. As so amended the plea was held good. The plaintiff then filed a replication, and, on issue tried, the plea was sustained by the circuit court. The bill was ordered dismissed. On appeal no error was assigned upon the ruling of the court in sustaining the amended plea as sufficient in law. It was accordingly held that the question of the sufficiency of the plea was not before the court. But on the question of the sufficiency of the proof to sustain the plea, the decision was reversed and the case remanded with instructions that the defendant be ordered to answer.

### § 909. Policy of Rule.

It might seem that a practice permitting a defendant whose plea is disproved to go on and answer operates with hardship on the plaintiff. Under rule 33, a plea that is proved avails the defendant as far as "in law and equity" it ought to avail him. There is no analogous saving provision in regard to a plea that is disproved. The defendant has an absolute right to answer; and the plaintiff, so far as the express provisions of the rule go, gets no benefit from the finding against the plea. At this point, however, an unwritten rule of equity practice operates in favor of the plaintiff, and this does in fact secure to the plaintiff all the benefit that in law and equity ought to accrue to him from the overruling of the plea on the issue of fact. The rule referred to is this, namely, that a defendant whose plea has been found to be unsustained by the proof cannot again rely in his answer on the same matter that has been unsuccessfully urged in the plea.<sup>103</sup> The adverse finding on the plea effectually eliminates the issue contained in it from the suit; and at the final hearing on the merits a decree will be entered in favor of the plaintiff (provided always the equity of his case is primarily established), unless the defendant makes out an independent meritorious defense other than that contained in his plea.

<sup>102</sup> After the overruling of a plea in abatement to the jurisdiction embodied in an answer and separately tried on the issue of fact, the defendant has a right to be permitted to defend on the merits. *Reavis v. Reavis* (1900) 101 Fed. 19. Such is the effect of this decision, but the point arose in a very awkward way, and the case is of little value as authority. But the point indicated is good law, even apart from the decision referred to.

<sup>103</sup> *Pentlidge v. Pentlidge* (1884) 22 Fed. 412.

The real objection to the practice of allowing the defendant to answer after his plea is disproved, and the real hardship thereby imposed on the plaintiff under this practice, are found in the fact that the cause is thereby tried piecemeal. This objection can be urged with equal force against the practice (resulting from rule 33) whereby a defendant must sometimes proceed to answer though the issue on the plea is found in his favor. No doubt, in both situations, the ends of justice are better promoted by the modern practice than by that which formerly prevailed.

### § 910. Right of Plaintiff to Insist on Discovery.

What has been said in the last few sections is concerned with the right of the defendant to answer after his plea has been overruled. The right of the plaintiff to insist on an answer, in case the defendant does not wish to answer, has not been discussed. But of course this point is clear. If the bill seeks a discovery—and this is the only place where the plaintiff could wish to insist on an answer—the defendant will be ordered to answer, or to be examined on the interrogatories. This is the plaintiff's right, and he may undoubtedly insist on it.<sup>104</sup> If this were not the law, a defendant could always escape from the necessity of giving discovery by putting in a false plea. This, of course, is not permitted.

### § 911. Pro Confesso Not Permissible on Plea Interposed for Delay.

A suggestion is to be found in one case to the effect that if the issue of fact is found against the defendant, and the court is of the opinion that the plea was interposed vexatiously and for purposes of delay, the court can for that reason refuse to permit the defendant to proceed to answer and may order a *pro confesso* to be taken against him.<sup>105</sup> This proceeds from a misinterpretation of equity rule 34. The *pro confesso* allowed by that rule is the one that is taken when a defendant is assigned to answer but refuses to do so. By the same rule the costs of the cause up to that time can be assessed against the defendant, if the court thinks his plea vexatious, but no other penalty is imposed on this account.

### § 912. Desirability of Using Pleas in Equity Practice.

A conclusion of some practical importance in regard to the use of the plea as a mode of defense under the system of practice prevailing

<sup>104</sup> Kennedy v. Creswell (1878) 101 U. S. 644, 25 L. ed. 1075; Westervelt v. Library Bureau (C. C. A.; 1902) 55 C. A. 436, 118 Fed. 824. <sup>105</sup> American etc. Co. v. Leeds (1905) 140 Fed. 981.

in the federal courts is this: Instead of being an instrument highly dangerous to the defendant, the plea has become a very safe and even desirable mode of defense from the point of view of the defense. Under the former practice there was an appreciable danger that a defendant who resorted to a plea might get seriously hurt, for by resorting to the plea he staked all on his ability to establish the plea. Under the present practice, he may well be anxious to resort to a plea on every proper occasion; for, as we have seen, if the plea is tried on the issue of fact and found true, it avails the defendant as far as in law and equity it ought to avail him, entitling him perchance to a dismissal of the bill; while if the plea is not so established, the defendant is entitled to answer the bill and set up other defenses.

### § 913. Reserving Benefit of Plea to Final Hearing.

Another practical observation may be made in regard to the attitude that a court should assume in disposing of pleas. Evidently, as pleas are now less conclusive than they used to be, the court should be less inclined to use up its time in working out the problems presented by them. If there is any doubt about the efficacy and conclusiveness of the issue raised by the plea, or any doubt as to its merit the court may very well pass the matter on to the final hearing. This is done by an order overruling the plea and allowing the defendant to incorporate the plea in his answer, by an order reserving the benefit of the plea to the final hearing, or by an order allowing the plea to stand for an answer. Orders like these can be most appropriately made when the plea comes before the court on argument of its sufficiency. Consequently the plaintiff's solicitor should always, where the effectiveness of the plea is at all questionable, set it down for argument without fail, in order to give the court timely opportunity either to overrule the plea or to pass it to the final hearing.

### *Pleas of Former Suit Pending and Former Adjudication.*

### § 914. Argument of Sufficiency.

The practice in regard to the disposition of the pleas of former suit pending and former adjudication is somewhat peculiar and requires passing notice. If such a plea is put in, the plaintiff may set it for argument, if he thinks it to be insufficient in law, the same as he would any other plea.<sup>100</sup>

<sup>100</sup> *Green v. Bogue* (1895) 159 U. S. 80 Fed. 417; *Mitt. Eq. Pl.* (Tyler's ed.) 478, 39 L. ed. 1061; *Zimmerman v. So* 393.  
*Belle* (C. C. A.; 1897) 25 C. C. A. 518, In case the plea is set for argument,

### § 915. Reference to Ascertain Truth of Plea.

On the other hand, if the plea is good in substance, and the plaintiff wishes to question the fact of the existence of the record set forth in the plea or the pendency of the suit referred to therein, he may at once ask the court for a reference to the master to inquire into the existence and identity of the record.<sup>107</sup>

It is needless to suggest that the matter of referring a plea of former suit pending or former adjudication is entirely within the discretion of the court; and unless a court has a standing master to whom the reference can be immediately taken, or unless the issues are quite complicated, the practice has nothing much to commend it. On such a reference the identity of the parties and the identity of the respective causes of action are properly included in the reference.<sup>108</sup> But it is not within the legitimate scope of the reference to have the master pass on questions of inference from the record.

*Emma Silver Mining Co. v. Emma etc. Co.* (1890) 1 Fed. 39: Former judgments were pleaded in bar. The plaintiff moved for a reference to the master to take proof of the truth of the pleas. An order nisi was entered, referring it to the master to ascertain and report as to the truth of the existence of records corresponding with those set forth in the pleas, and directing the master to return copies of such records; but the order, by its terms, was not to become effective if the plaintiff should himself, within ten days, produce copies of the desired records.

The motion for the reference was resisted on the ground that equity rules 33 to 38, inclusive, contemplate and require that when a plea is filed the defendant shall either take issue or set it down for argument, and that, by implication, the English practice of referring a plea of this kind to the master is abolished. The objection was overruled; first, because the practice in question is one that is sometimes calculated to expedite the cause and facilitate the argument of the same on its merits; secondly, because such a reference is not inconsistent with the equity rules, being merely a preliminary step; thirdly, because equity rule 90 expressly adopts the English chancery practice, so far as the same is applicable, on points not covered by our own equity rules.

### § 916. Former Suit Pending in State Court.

The pendency of a prior suit in a state court supplies no valid objection to the maintenance of another suit in a federal court

could the court, of its own motion or on a suggestion from the plaintiff, require the defendant, before the plea is argued, to produce a copy of the record relied on by him? There are dicta to the effect that the court may do so. *Emma Silver Mining Co. v. Emma etc. Co.* (1890) 1 Fed. 39, 42; *Phelps v. Elliott* (1886) 26 Fed. 883.  
<sup>107</sup> *Mitt. Eq. Pl.* (Tyler's ed.) 392.  
<sup>108</sup> *John D. Park & Sons Co. v. Bruen* (1904) 133 Fed. 507.

between the same parties concerning the same subject-matter.<sup>109</sup> Hence where the plea sets up the pendency of such a suit, the plea is insufficient, and reference will not be ordered.

But the federal court, if it sees fit to do so, may, as a matter of comity, suspend proceedings in the suit until that already instituted in the state court is disposed of, after which the federal court proceeds in the light of the adjudication made by the state court.<sup>110</sup> After the determination of the cause in the state court, the defendant in the federal suit will, no doubt, be granted leave to plead; and he can then set up the judgment of the state court by a plea in bar.

<sup>109</sup> *Stanton v. Embrey* (1877) 93 U. S. Fed. 373, 374; *Short v. Hespburn* (1896) 548, 554, 23 L. ed. 983; *Gordon v. Gilfoil* (1879) 99 U. S. 168, 178, 25 L. ed. 383, 386; *Latham v. Chafee* (1881) 7 Fed. 520, 523; *Sharon v. Hill* (1884) 22 Fed. 23, 30; *Beakman v. Railroad Co.* (1888) 36 Fed. 3, 10; *Pierce v. Feagans* (1889) 39 Fed. 587, 588; *Rawitzer v. Wyatt* (1889) 40 Fed. 609, 610; *Marshall v. Otto* (1893) 59 Fed. 249, 252; *Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co.* (1894) 61 Fed. 199; *City of North Muskegon v. Clark* (1894) 10 C. A. 561, 62 Fed. 694, 698; *Woodbury v. Railroad Co.* (1895) 72 Fed. 371, 374; *First Nat. Bank v. Ducl Co.* (1896) 74 Fed. 373, 374; *Short v. Hespburn* (1896) 21 C. C. A. 252, 75 Fed. 113; *Rodgers v. Pitt* (1899) 96 Fed. 668, 677; *Wadleigh v. Veazie* (1838) 3 Sumn. 165, Fed. Cas. No. 17,031; *White v. Whitman* (1853) 1 Curt. C. C. 494, Fed. Cas. No. 17,561.

<sup>110</sup> *Foley v. Hartley* (1896) 72 Fed. 570, 571; *Zimmerman v. So Relle* (1897) 25 C. C. A. 518, 80 Fed. 417; *Hughes v. Green* (1898) 28 C. C. A. 537, 84 Fed. 833, 835; *Ryan v. Railroad Co.* (1898) 89 Fed. 397, 408; *Rodgers v. Pitt* (1899) 96 Fed. 668, 671; *Bunker Hill & Sullivan etc. Co. v. Shoshone etc. Co.* (1901) 47 C. C. A. 200, 109 Fed. 504, 508.

## CHAPTER XXII.

### DEMURRERS.

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*Nature and Function of Demurrer.***§ 917. Demurrer Lies to Bill Only.**

The great faultfinder in equity pleading, as in proceedings at common law, is the demurrer, though this instrument does not find so wide a use in equity as at common law. In legal proceedings the demurrer is adapted to the purpose of searching out defects in any pleading of the series; in equity it is used exclusively to point out defects in respect to the allegations of the bill. Legal defects in the allegations of the answer and plea are, as we have seen, tested by other means. Demurrers to the evidence are also unknown to equity practice.<sup>1</sup>

<sup>1</sup> *Blackburn v. Stannard* (1842) Fed. Cas. No. 1,468.

A demurrer lies, of course, to a cross bill, amended bill, or supplemental bill, to the same extent as to the original bill, and subject to the same general principles.

**§ 918. Demurrer Reaches First Defective Pleading.**

A demurrer at common law is said to be a general faultfinder, and it is a well-established principle of common-law pleading that a demurrer interposed at any stage in the series of pleadings reaches back to the first error of pleading and necessitates the giving of judgment against the party who put in the first defective pleading, even though that party should be the demurrant himself. It is sometimes said that this rule is applicable in equity pleading.<sup>2</sup> This is not exactly true, however. The series of pleadings in equity always terminates with the formal replication to the plea or demurrer; and demurrers are properly used only in connection with the bill. It follows that there is no room in equity pleading for the operation of the rule that the demurrer reaches back to the first fault. In equity a demurrer can prevail only on a defect in that pleading (the bill) to which the demurrer is directed. Of course, if the demurrer is illegitimately used to a plea or answer, then the rule may conceivably come into operation.

**§ 919. Office of Demurrer.**

The demurrer tests the sufficiency of the bill in point of law. It is "an objection made by one party to his opponent's pleading, alleging that he ought not to answer it, for some defect of law in the pleading."<sup>3</sup> Where the bill shows on its face that it is not maintainable, the defendant ought to demur; and it is bad pleading to put in a plea or answer to such a bill. This point is rudimentary and is constantly assumed in the decisions, though seldom expressly enunciated.<sup>4</sup>

**§ 920. General Principle Governing Use of Demurrer.**

Any defect apparent on the face of the bill or shown by any exhibit, which defect is in law sufficient to disentitle the plaintiff to an answer or which shows that he ought not to have all the relief

<sup>2</sup> See *United States v. Peralta* (1900) 99 Fed. 618, 624; *Beard v. Bowler* 316, 30 L. ed. 689, (1866) Fed. Cas. No. 1,160.

<sup>3</sup> *Tyler v. Hand* (1849) 7 How. 561, 12 L. ed. 827.

<sup>4</sup> *Farley v. Kittson* (1887) 120 U. S.

prayed for or some part of it, affords ground for a demurrer. The defect may go to the whole bill and vitiate the entire cause, or it may infect only a part of it. In every case the practical effect of the demurrer, if sustained, is to preclude the plaintiff from maintaining his bill or from insisting on the matter to which the demurrer is directed. The nature and function of the demurrer to the bill in equity was long ago stated by Mr. Mitford (afterwards Lord Redesdale) in language so precise and accurate that it has been judicially quoted and adopted many times. We accordingly reproduce it here.

Mitford, *Equity Pleadings* (Tyler's ed.) 203: "Whenever any ground of defense is apparent on the bill itself, either from matter contained in it, or from defect in its frame, or in the case made by it, the proper mode of defense is by demurrer. A demurrer is an allegation of a defendant, which, admitting the matters of fact alleged by the bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer; or that for some reason apparent on the face of a bill, or because of the omission of some matter which ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer. It therefore demands the judgment of the court whether the defendant shall be compelled to make answer to the plaintiff's bill, or to some certain part thereof. The causes of demurrer are merely upon matter in the bill, or upon the omission of matter which ought to be therein or attendant thereon; and not upon any foreign matter alleged by the defendant. The principal ends of a demurrer are, to avoid a discovery which may be prejudicial to the defendant, to cover a defective title, or to prevent unnecessary expense. If no one of these ends is obtained, there is little use in a demurrer. For, in general, if a demurrer would hold to the bill, the court, though the defendant answers, will not grant relief upon hearing the cause. There have been, however, cases in which the court has given relief upon hearing, though a demurrer to the relief would probably have been allowed. But the cases are rare."

#### § 921. Demurrer Must Be Based on Matter of Record.

The demurrer, it will be noted, must be based exclusively on matter apparent on the face of the bill. The objection must be directed to matter in the bill or to the omission of matter that should be inserted. Matter *dehors* the bill is not to be considered by the court in passing on the demurrer. In passing on a question raised by demurrer, reference cannot be had to a document filed with the papers, but not incorporated in the bill as an exhibit.<sup>5</sup>

Even with the consent of counsel, a court cannot, on demurrer, properly consider facts not stated in the bill;<sup>6</sup> but, of course, by

<sup>5</sup> *Partee v. Thomas* (1882) 11 Fed. 769.

<sup>6</sup> *Stratton v. Dewey* (1897) 79 Fed. 32, 24 C. C. A. 435.

stipulation new matter can be incorporated in the bill or be treated as being incorporated therein, and when this is done such matter may be considered on demurrer. Exhibits to the bill are part of the bill if they are properly referred to and thereby incorporated in it.<sup>7</sup>

*Pacific etc. R. Co. v. Missouri Pac. Ry.* (1884) 111 U. S. 505, 28 L. ed. 498: In an original bill to impeach a decree for fraud, an effort was made to induce the court, in deciding a demurrer, to refer to the record in the case in which the decree in question was rendered. That record was not made a part of the bill, though the plaintiff did in his bill ask "liberty" to refer to that record. It was held that the matter could not be used.

### § 923. Speaking Demurrer.

A speaking demurrer is one that seeks to import into the record matter not stated in the bill and to have the bill dismissed because of the matter so brought in. Such a demurrer is bad. Extrinsic facts can be made available only by plea or answer.<sup>8</sup>

1. *O'Shaughnessy v. Humes* (1904) 129 Fed. 954: A bill was filed against a husband and his wife to enforce liability arising out of a certain obligation of indebtedness, and for the adjustment of other equities. The bill did not allege, nor did the obligation show on its face, that the wife signed as a surety for her husband; but for aught that appeared in either, the husband and wife were both principals. A demurrer was interposed which assumed that the wife was a surety for the husband. It was held that this was a speaking demurrer, and it was accordingly overruled.

2. *Richardson v. Loree* (C. C. A.; 1899) 36 C. C. A. 301, 94 Fed. 375: A bill was filed to impeach a former decree; and the suit was ancillary to the former suit, in the sense that the court had jurisdiction without regard to the citizenship of the parties to the new proceeding. The proceedings in the former suit were not made a part of the bill. It was held that on demurrer the court could not look to that record, and that any references in the demurrer to such former proceedings could not incorporate them in the suit, for that would make the demurrer bad as a speaking demurrer.

### § 923. Extrinsic Matter in Demurrer Treated as Surplusage.

Though the statement of new or extrinsic facts in a demurrer turns it into a speaking demurrer and thereby renders it objec-

<sup>7</sup> *Ulman v. Jaeger* (1895) 67 Fed. 960, 992.

<sup>8</sup> *Stewart v. Masterson* (1889) 131 U. S. 151, 33 L. ed. 114; *Lamb v. Starr* (1868) Fed. Cas. No. 8,021; *Nicholas v. Murray* (1878) Fed. Cas. No. 10,223.

In a case rendered somewhat peculiar by the bad pleading displayed, it was held that a particular pleading, styled demurrer, which was bad as a demurrer

because it stated facts not contained in the bill, could be treated as a combined demurrer and plea,—a demurrer in so far as it challenged the legal sufficiency of the facts stated in the bill and a special plea in so far as it set up facts in avoidance extrinsic to the matter of bill. *United States v. Peralta* (1900) 99 Fed. 613.

tionable, such matter is sometimes ignored as surplusage in considering the validity of the demurrer.<sup>9</sup> But undoubtedly a court, if so minded, may well overrule such a demurrer exclusively on the ground that it relies on facts not contained in the bill.

#### § 924. Different Grounds of Demurrer to One Bill.

A defendant is not limited in respect to the number of causes of demurrer assignable to one bill. He may assign as many causes of demurrer as he pleases, either to the whole bill or to the several parts of it; and if any one of the causes of demurrer is found to be good, that ground of demurrer will be allowed.<sup>10</sup> It will be noted that, in this respect, the rule applicable to the demurrer is different from that which maintains in regard to the plea.

#### § 925. Who May Demur.

Generally speaking, only he can demur who is affected by the defect of form or substance of which complaint is made. It has been held that the objection of multifariousness, resulting from the improper joinder of an unnecessary party defendant, is available on demurrer only at the instance of the party thus improperly joined. A party who is properly sued has no right to object that another who is sued with him is improperly made a defendant.<sup>11</sup>

But for misjoinder of a party plaintiff any of the defendants may demur, for the irregularity affects all of them. So any defendant may demur for the nonjoinder of any necessary party, either plaintiff or defendant.<sup>12</sup>

The objection of multifariousness resulting from a misjoinder of causes of action can be taken advantage of by any of the defendants.<sup>13</sup>

#### § 926. Admissions of Demurrer.

As the demurrer challenges only the legal sufficiency of the matter in the bill to which the demurrer is directed, it necessarily admits the

<sup>9</sup> *Star etc. Co. v. Klahn* (1906) 145 Fed. 834.

<sup>10</sup> 2 Dan. Ch. Pr. 72.

<sup>11</sup> *Hill v. Bonaffon* (1876) Fed. Cas. No. 6,488; *Buerk v. Imhaeuser* (1881) 8 Fed. 457; *Torrent v. Hamilton* (1893) 95 Mich. 163.

<sup>12</sup> *Peoria, Decatur etc. R. Co. v. Pixley* (1884) 15 Ill. App. 283.

The demurrer for nonjoinder of a defendant will, however, be overruled, if it appears that the party to whose nonjoinder exception is taken lives out of the jurisdiction and is a dispensable party. *Atwill v. Ferrett* (1846) 2 Blatchf. 39.

<sup>13</sup> *Swift v. Eckford* (1836) 6 Paige, 32.

allegations of the bill to be true in point of fact. This admission extends to all facts and matters that are well pleaded.<sup>14</sup>

The demurrer does not admit matters of mere inference or legal conclusions.<sup>15</sup> For instance, if one files a bill against trustees under a mortgage, his allegations of fact are admitted by the demurrer to his bill, but his contentions as to the import of the mortgage and as to his rights under it are not so admitted. These are for the determination of the court under the terms of the instrument itself.<sup>16</sup> Similarly, a general allegation of a trust relationship, arising from a deposit of money or securities with the defendant by the plaintiff, will not, on demurrer, be taken to admit the creation of a technical trust relation such as will give equitable jurisdiction. A mere deposit creates a bailment, not a technical trust cognizable in equity.<sup>17</sup>

### § 927. Inferences of Fact Admitted by Demurrer.

Strained inferences of fact drawn from the statements of the bill are not available on demurrer either to defeat or sustain the bill.<sup>18</sup> Reasonable presumptions and necessary inferences of fact from the matters stated are, however, admitted by the demurrer and are to be assumed as true in passing on the demurrer.<sup>19</sup> A fact impossible in law cannot be deemed to be admitted by a demurrer.<sup>20</sup>

### § 928. Certainty of Allegations as Affecting Admissions of Demurrer.

Before matter can be assumed to be true on demurrer, it must be stated in the bill with sufficient certainty. That is to say, where the effectiveness of a demurrer depends on the existence of a particular fact but it appears that the bill does not really allege that fact, the demurrer will be overruled. Only facts actually stated in the bill

<sup>14</sup> *Shelton v. Van Kleeck* (1832) 106 U. S. 534, 27 L. ed. 270; *Hopper v. Covington* (1836) 118 U. S. 151, 30 L. ed. 192; *U. S. v. Mann* (1877) 95 U. S. 584, 24 L. ed. 532; *Burgess v. Gray* (1853) 16 How. 62, 14 L. ed. 845; *Christmas v. Russell* (1866) 5 Wall. 303, 18 L. ed. 479; *Tyler v. Hand* (1849) 7 How. 581, 12 L. ed. 827; *Bayerque v. Cohen* (1856) Fed. Cas. No. 1,134; *Woodworth v. Edwards* (1847) Fed. Cas. No. 18,014; *Dillon v. Barnard* (1874) Fed. Cas. No. 3,915.

<sup>15</sup> *Preston v. Smith* (1886) 26 Fed. 884; *Cornell v. Green* (1890) 43 Fed. 105 *appeal dismissed* (1896) 16 Sup. Ct. 969, 163 U. S. 75, 41 L. ed. 76; *Mosher v. St. Louis etc. R. Co.* (1888) 127 U. S. 235, 32 L. ed. 251; *U. S. v. Ames* (1878) 99 U. S. 45, 25 L. ed. 300.

<sup>16</sup> *Dillon v. Barnard* (1874) 21 Wall. 430, 22 L. ed. 673; *U. S. v. Ames* (1878) 99 U. S. 45, 25 L. ed. 300; *Gould v. Evansville etc. R. Co.* (1875) 91 U. S. 536, 23 L. ed. 419.

<sup>17</sup> *Young v. Mercantile Trust Co.* (1905) 140 Fed. 61.

<sup>18</sup> *Building & Loan Ass'n of Dakota v. Price* (1898) 16 Sup. Ct. 251, 169 U. S. 45, 42 L. ed. 655; *Preston v. Smith* (1886) 26 Fed. 884.

<sup>19</sup> *McClanahan v. Davis* (1850) 8 How. 170, 12 L. ed. 1033; *Amory v. Lawrence* (1872) Fed. Cas. No. 336.

<sup>20</sup> *Louisville etc. R. Co. v. Palmes* (1883) 109 U. S. 253, 27 L. ed. 925.

and necessary inferences from those facts can be used to defeat the bill on demurrer.<sup>21</sup> Contrariwise, if the right to maintain the bill depends on the truth of a particular fact alleged in the bill and it appears that such fact is merely an inferential averment not supported by the record as a whole, the bill will be dismissed. Only the facts stated and necessary inferences from those facts can be used on demurrer as a basis of the judgment.<sup>22</sup>

*Reagan v. Farmers' Loan & Trust Co.* (1894) 154 U. S. 401, 38 L. ed. 1024: In discussing the principle that a demurrer admits the facts alleged in the bill, the supreme court observed that pleadings often contain general allegations of mixed law and fact, and care must be taken not to give this constructive admission by demurrer too far-reaching an effect. The general allegations are always to be qualified, limited, and controlled by the particular facts stated in the pleading. "It would not be tolerable for a court administering equity to seize upon a technicality for the purpose of or with the result of entrapping either of the parties before it."

In the particular case the court held that the circumstance that the demurrer was filed with deliberation, and after permission had been obtained to withdraw the answer, was sufficient to justify the court in construing the allegations of the bill favorably to the plaintiff and unfavorably to the demurrant.

### *Classification of Demurrers.*

#### § 929. *Sorts of Demurrers.*

Writers on equity pleading have given considerable attention to the formal classification of demurrers as regards the various defects in the bill to which they may be directed. The following division, based on that of Mr. Daniell but somewhat different from his, will suffice for the purposes of the present work. Demurrers to bills for discovery and relief may be divided into: (1) demurrers to the jurisdiction; (2) demurrers to the person of the plaintiff; (3) demurrers to the matter of the bill as regards its form; (4) demurrers to the matter of the bill as regards its substance.

#### § 930. *Demurrer to Jurisdiction.*

Demurrers to the jurisdiction are, in respect to the federal courts, divisible into (a) those that go to the question whether the case stated in the bill is one within the special and limited jurisdiction of

<sup>21</sup> *Union Pac. R. Co. v. Meier* (1880) 28 Fed. 9; *Pettit v. Hope* (1880) 2 Fed. 623.

<sup>22</sup> *Hutton v. Joseph Bancroft & Sons* Co. (1897) 83 Fed. 17. Matter in avoidance of the equity of a bill is not avoidable on demurrer where such matter is not explicitly set forth in the bill. *Puget Sound Bank v. King County* (1893) 57 Fed. 433.

the federal court, and (b) those that go to the question whether the case stated in the bill is one of equitable cognizance. To specify in detail the various points on which a demurrer might be grounded under these heads would require us to canvass, in the one case, the entire field of the statutory jurisdiction of the federal courts and, in the other, the entire field of equity jurisdiction. No such enumeration will be here attempted.

#### § 931. Demurrer to Person.

Demurrers to the person raise the question of the competency of the plaintiff to maintain the suit. For instance, if the plaintiff, suing in his own name and right, appears to be an infant, a feme covert, or other person not competent so to sue in his own name and right, a demurrer to the person lies. In federal practice, the demurrer to the character of the plaintiff as regards his citizenship, in a case where jurisdiction is dependent on citizenship, is not to be treated as a demurrer to the person, but as a demurrer to the jurisdiction.

#### § 932. Demurrer to Form of Bill.

The demurrer to the matter of the bill as regards its form is directed to such defects as the following: the failure of the bill to state the abode of the parties, the lack of certainty in the allegations of the bill, the lack of positiveness in material allegations made as of the plaintiff's knowledge, the failure of the bill to offer equity in a case where this offer is required. The failure to comply with any formal requirement necessary on general principles of equity pleading and practice or necessary under the equity rules comes under this head.<sup>22</sup> But we may add that though the formal defects referred to here are undoubtedly available on demurrer, there are some of them that may also be taken advantage of by motion to strike the bill from the file; and a preference for the latter mode of proceeding has sometimes been expressed where the defect is of a purely formal and venial character.

#### § 933. Demurrer to Substance of Bill.

Demurrers to the matter of the bill in regard to its substance find illustration in cases where the points raised are such as these: that the plaintiff has no interest in the subject-matter; that the defendant is not answerable to the plaintiff but to some other person; that

<sup>22</sup> 2 Dan. Ch. Pr. 46.



the defendant has no interest; that there is a want of necessary or proper parties; that the bill is multifarious; that there is another suit pending between the same parties in regard to the same matter; and, generally, under this head, the point may be raised that the plaintiff is not entitled to the relief he has prayed or to any relief at all.<sup>24</sup>

*General and Special Demurrers.*

**§ 934. General Demurrer.**

A demurrer will not be good if it merely says that the defendant demurs to the bill. Some ground of demurrer, either general or special, must be assigned. The general demurrer challenges, in general terms, the right of the plaintiff to have any relief, or discovery and relief, upon the facts stated in the bill.<sup>25</sup> Its usual form is that of the general demurrer for want of equity on the face of the bill. The main clause of the general demurrer runs to the effect that the plaintiff has not, by his said bill, made such a case as entitles him, in a court of equity, to any discovery from the defendant, or any relief against him, as to the matters contained in the said bill, or any of such matters.<sup>26</sup> It is sometimes otherwise expressed thus: said bill of complaint contains not any matter of equity, whereon this court can ground any decree, or give the plaintiff any relief or assistance, as against them these defendants.<sup>27</sup>

Under a general demurrer, the defendant can have the benefit of any defect of substance fatal to the maintenance of the bill; and no other demurrer is essential where the defect is of this character. The general demurrer always goes to the whole bill. As a consequence, if the general demurrer is sustained, it is fatal to the maintenance of the suit in its entirety.

**§ 935. Special Demurrer.**

The special demurrer points out with precision the particular defect which the defendant supposes to be fatal to the cause. The

<sup>24</sup> 2 Dan. Ch. Pr. 35, *et seq.*

<sup>25</sup> *Griffing v. Gibb* (1863) 2 Black, 519, 17 L. ed. 353.

Under the term general demurrer, Mr. Daniell includes all demurrers that go to the substance of the whole bill, or to the jurisdiction, whether the demurrer specifies the particular ground of demurrer or is expressed only in general terms. 2 Dan. Ch. Pr. 71. This is not in conformity with the definition of other writers on equity pleading. Story, Eq. Pl. 455; Fletcher, Eq. Pl. & Pr. § 206.

However in the cases we frequently find a demurrer to the whole bill spoken of as a general demurrer in conformity with the definition of Mr. Daniell. This is a cause of some confusion.

<sup>26</sup> Story, Eq. Pl. 455, note.

A demurrer expressed in this form is in effect a general demurrer for want of equity and will be sustained where the defect is apparent on the face of the bill. *Maeder v. Buffalo etc. Co.* (1904) 132 Fed. 280.

<sup>27</sup> Barton, Suit in Eq. 107, 108.

special demurrer may be directed to the whole or to any material part of the bill; and it is an established rule that, in order to be effective, the special demurrer must be directed to so much of the bill only as is really bad. If its scope is such as to cover facts necessary to the good cause of action stated in the bill as well as the facts material to the bad cause of action, the demurrer must be overruled.<sup>28</sup>

The advantage of demurring specially is that by this means the court is apprised of the exact point intended to be raised whether of form or of substance. The use of such demurrers is conducive to clearness and effectiveness in pleading. In framing his demurrer the plaintiff should never fail to demur specially. If any good reason exists why the bill, or part of it, should not be entertained, it is reasonable to suppose that this reason can be tersely and specifically stated. If the demurrer contains a clear and concise statement of the ground on which it is based, it speaks for itself and constitutes the best argument in support of it.

#### § 936. When Special Demurrer Necessary.

A special demurrer must always be used when the defect to be relied on is one of mere form.<sup>29</sup> It must also be used to get the benefit of any defect not absolutely destructive of the equity of the bill. Multifariousness is a defect of this kind. Hence, in case of a demurrer for multifariousness, a mere allegation that the bill is multifarious is informal and insufficient. The demurrer should state that the bill unites distinct matters upon one record, and it should point out how this is so.<sup>30</sup>

#### § 937. Desirability of Demurring to Whole Bill.

In addition to the special demurrer, the pleader should also usually insert the general demurrer, or at least he should always have on record a demurrer of some sort going to the whole bill. However, the liberty of the pleader in this respect is somewhat abridged by the requirement of a certificate from the solicitor that he considers the demurrer well taken. The reason why it is desirable to have on record a demurrer, general or special, going to the whole bill is found in the fact that under such a demurrer objection may be orally taken to matters which are not specially stated in the demurrer

<sup>28</sup> *United States v. Southern Pac. R.* 12 L. ed. 827; *Christmas v. Russell Co.* (1899) 40 Fed. 611. (1866) 5 Wall. 303, 18 L. ed. 479.

<sup>29</sup> *Tyler v. Hand* (1849) 7 How. 562,      <sup>30</sup> 2 Dan. Ch. Pr. 71.

but which are fatal to the maintenance of the suit.<sup>31</sup> A defendant who takes advantage of this rule is said to demur *ore tenus*.

### *Demurring Ore Tenus.*

#### § 938. Nature of Demurrer Ore Tenus.

To demur *ore tenus* it is merely necessary for the solicitor of the defendant to make an oral statement at the argument of the demurrer of record, pointing out the defect on which he wishes to rely.<sup>32</sup> A demurrer *ore tenus* will be sustained, if it is found to be well taken, though the cause or causes of demurrer stated in the written demurrer are held to be invalid.<sup>33</sup>

A defendant cannot demur *ore tenus* when there is no demurrer of any sort on record.<sup>34</sup> A demurrer *ore tenus* for lack of necessary parties may be sustained under a demurrer to the whole bill for want of equity.<sup>35</sup> The same is true of the defect arising from a misjoinder of parties or causes of action.<sup>36</sup>

#### § 939. Scope of Demurrer Ore Tenus.

The right to demur *ore tenus* is subject to the rule that the cause of demurrer so assigned must be coextensive with the demurrer, or one of the demurrers on the record. A demurrer *ore tenus* must be as broad as and no broader than the demurrer of record. If the demurrer of record goes to the whole bill, the oral demurrer must be to the whole bill. A special demurrer *ore tenus* to a part of the prayer of a bill is not admissible under a demurrer to the whole bill.<sup>37</sup>

#### § 940. Demurrer Ore Tenus to Part of Bill.

It was once held in the Exchequer Chamber that a demurrer *ore tenus* will not lie to a part only of a bill. It must, so the court

<sup>31</sup> *Post v. Beacon etc. Co.* (1893) 32 C. C. A. 151, 89 Fed. 1.

<sup>32</sup> 2 Dan. Ch. Pr. 73.

A rule of the United States Circuit Court for the District of New Jersey adopts the rules of practice and proceedings in the court of chancery of New Jersey when the equity rules prescribed by the supreme court of the United States do not apply. In 1886 the New Jersey court of chancery promulgated the following rule: "Every demurrer, whether general or special, shall state the particular grounds of demurrer." Its present language is this: "Every demurrer, whether general or special,

shall distinctly specify the ground or several grounds of demurrer." This rule has perhaps abrogated, in New Jersey, the practice of assigning causes of demurrer *ore tenus* at the argument. *Maeder v. Buffalo Bill's Wild West Co.* (1904) 132 Fed. 280, 281; *Essex Paper Co. v. Greacen* (1889) 45 N. J. Eq. 504, 19 Atl. 466.

<sup>33</sup> 2 Dan. Ch. Pr. 73.

<sup>34</sup> *Cooper*, Eq. Pl. 112.

<sup>35</sup> 1 Barbour, Ch. Pr. 109.

<sup>36</sup> *Barrett v. Doughty* (1874) 25 N. J. Eq. 379.

<sup>37</sup> *Equitable Life Soc. v. Patterson* (1880) 1 Fed. 126.

thought, go to the whole bill, or it is bad.<sup>38</sup> However, there appears to be no good reason why a demurrer *ore tenus* might not be sustained to a part of the bill, where a special demurrer to that part has been assigned on the record; and by the practice of the English chancery, a demurrer *ore tenus* could be taken to part of the bill the same as to the whole.<sup>39</sup>

### *Grounds of Demurrer.*

#### § 941. *Specific Grounds of Demurrer.*

The classification given in sections 929-933, *ante*, shows somewhat of the scope of the field wherein the demurrer may be used, and it seems not desirable to pursue the matter of classification minutely here. The following illustrations drawn from the cases and arranged without any particular reference to the divisions indicated above are perhaps worth giving: A demurrer lies for such defects apparent on the face of the bill as want of jurisdiction resulting either from the limited power of the court or from the nature of the cause.<sup>40</sup> That the plaintiff's remedy is at law and not in equity is available on demurrer.<sup>41</sup> The misjoinder of parties plaintiff or defendant supplies a good ground for demurrer.<sup>42</sup>

Where the bill shows that the subject-matter in respect to which relief is sought did not exist at the time of the filing of the bill, a demurrer will lie. Thus where a bill was filed to set aside an extension of a patent and it appeared that the extension had already expired, the objection was held to be properly raised in this way.<sup>43</sup>

Want of equity apparent on the face of the bill or, what is the same thing, an absence of facts constituting a cause of action, sup-

<sup>38</sup> *Shepherd v. Lloyd* (1823) 2 Youngs & J. 490. *Carey v. Brown* (1875) 92 U. S. 171, 23 L. ed. 469; *Greenleaf v. Queen* (1828)

<sup>39</sup> So held in the Rolls Court in *Crouch v. Hickin* (1836) 1 Keen, 385; 2 Dan. Ch. Pr. 73, 74. *c. Newman* (1896) 23 C. C. A. 459, 77 Fed. 787, 791; *Segee v. Thomas* (1853)

<sup>40</sup> *Whitehead v. Shattuck* (1891) 139 U. S. 146, 34 L. ed. 873; *Smyth v. New Orleans etc. Co.* (1891) 141 U. S. 656, 35 L. ed. 891; *Fishback v. W. U. T. Co.* (1896) 161 U. S. 96, 40 L. ed. 620; *Noyes v. Willard* (1871) Fed. Cas. No. 10,374; *Pond v. Vermont Val. R. Co.* (1874) Fed. Cas. No. 11,265; *Ketchum v. Driggs* (1863) Fed. Cas. No. 7,735. *3 Blatchf. 11, Fed. Cas. No. 12,633; Florence Sewing-Mach. Co. v. Singer Manuf'g Co.* (1870) 8 Blatchf. 113, Fed. Cas. No. 4,884; *U. S. v. Gillespie* (1891) 6 Fed. 803.

<sup>41</sup> *Walker v. Powers* (1881) 104 U. S. 245, 26 L. ed. 729; *Hodge v. North Missouri R. R.* (1869) Fed. Cas. No. 6,561; *Harrison v. Rowan* (1819) Fed. Cas. No. 6,143.

<sup>42</sup> *Consolidated Roller-Mill Co. v. Coombs* (1889) 39 Fed. 25; *Foster v. Swasey* (1846) Fed. Cas. No. 4,984; *Bourne v. Goodyear* (1870) 9 Wall. 811, 19 L. ed. 796.

plies a sufficient basis to rest a demurrer upon.<sup>44</sup> An equitable estoppel disclosed in the matter of the bill is fatal when the bill is demurred to on this ground, for it shows a want of equity.<sup>45</sup>

If a contract violates the statute of frauds, any bill seeking relief based on the validity of that contract is demurrable, if it appears on the face of the bill that the contract in question is not in writing.<sup>46</sup>

### § 942. Demurrer Relying on Statute of Limitations.

That a cause of action is barred by the statute of limitations is a ground for demurrer, when such fact appears in the bill and no equitable circumstances are stated to excuse the delay and destroy the effect of the bar.<sup>47</sup> The general rule in actions at law is that such defense is available only by plea, the reason being that the plaintiff might otherwise be cut off from his right to reply and prove matter in avoidance. But inasmuch as, in equitable proceedings, the pleadings end with a formal replication denying the matters or the sufficiency of the matters set up in the answer, the defense of the statute can be made by demurrer.<sup>48</sup>

### § 943. Demurrer for Laches in Bringing Suit.

The defense of laches, arising from the staleness of the claim which supplies the basis of the bill, is quite similar to the defense of the statute of limitations and is likewise available on demurrer.<sup>49</sup>

<sup>44</sup> *Nash v. Ingalls* (1897) 79 Fed. 4 C. C. A. 189, *affirming* (1892) 49 Fed. 510; *Nicholas v. Murray* (1878) Fed. 492; *McCabe v. Mathews* (1889) 40 Cas. No. 10,223.

<sup>45</sup> *Post v. Beacon etc. Co.* (C. C. A.; (1895) 66 Fed. 165; *Jones v. Slauson* (1898) 32 C. C. A. 151, 89 Fed. 1. (1888) 33 Fed. 632; *Horsford v. Gudger* (1888) 35 Fed. 388, *reversed* (1890) 10

<sup>46</sup> *Randall v. Howard* (1863) 2 Black 585, 17 L. ed. 269.

<sup>47</sup> *Rhode Island v. Massachusetts* (1841) 15 Pet. 233, 10 L. ed. 721; *Coddington v. Pensacola & Ga. R. R. Co.* (1881) 103 U. S. 409, 26 L. ed. 400; *Nash v. Ingalls* (1897) 79 Fed. 510, *affirmed* *Nash v. Ingalls* (1900) 101 Fed. 645, 41 C. C. A. 545; *Wisner v. Ogden* (1827) Fed. Cas. No. 17,914.

<sup>48</sup> *City of Memphis v. Postal Tel. Cable Co.* (1906) 76 C. C. A. 292, 145 Fed. 602.

<sup>49</sup> *Maxwell v. Kennedy* (1850) 8 How. 210, 12 L. ed. 1051; *Landsdale v. Smith* (1892) 106 U. S. 391, 1 Sup. Ct. 350, 27 L. ed. 219; *Speidel v. Henriel* (1887) 7 Sup. Ct. 610, 120 U. S. 377, 30 L. ed. 718, *affirming* (1883) 15 Fed. 753; *Hinchman v. Kelley* (1893) 54 Fed. 63, 4 C. C. A. 189, *affirming* (1892) 49 Fed. 510; *McCabe v. Mathews* (1889) 40 Fed. 338; *Merrill v. Town of Monticello* (1895) 66 Fed. 165; *Jones v. Slauson* (1888) 33 Fed. 632; *Horsford v. Gudger* (1888) 35 Fed. 388, *reversed* (1890) 10 Sup. Ct. 1069, 136 U. S. 639, 34 L. ed. 556; *Hubbard v. Manhattan Trust Co.* (1898) 87 Fed. 51, 30 C. C. A. 520; *Brush Electric Co. v. Ball Electric Light Co.* (1890) 43 Fed. 899; *McLaughlin v. People's R. Co.* (1884) 21 Fed. 574; *Copen v. Flesher* (1861) Fed. Cas. No. 3,211.

Though the defense of laches may be raised by demurrer, it should be remembered that this defense is one that may be available at the hearing on the merits. Laches is a want of equity, and the court will of its own motion refuse to grant relief where the cause of action is infected with this element. *Sullivan v. Portland R. Co.* (1877) 94 U. S. 806, 24 L. ed. 324; *National Cash Reg. Co. v. Union etc. Co.* (1906) 143 Fed. 342;

But if the bill shows in avoidance of the laches that the plaintiff was ignorant of the cause of action—and this without fault imputable to himself—and that as soon as the cause of action was discovered he bestirred himself diligently to obtain redress, the demurrer cannot be maintained.<sup>50</sup>

A cause will not be disposed of on a demurrer for laches, where it appears that the question thus raised is doubtful and can be more properly decided at the final hearing on the merits.<sup>51</sup> Sometimes the cause will not be decided on a demurrer for laches, for the reason that the question thus raised appears to be a mixed one of law and fact. It was so held in a case where the delay complained of as constituting laches was for a period shorter than would have constituted a bar under the statute of limitations.<sup>52</sup>

#### § 944. Defects of Form Waived by Failure to Demur.

Any defect arising from the informality of the bill is available on demurrer, and in most cases mere defects of form are not available to the defendant at all, unless timely objection is made by demurrer or motion to dismiss. The question of the uncertainty of the allegations of a bill must be raised by demurrer, and if it is not so raised, the benefit of the objection is lost, provided the allegations are sufficiently clear, when supported by more detailed proof, to ground a decree upon.<sup>53</sup>

#### *Scope and Effect of Demurrers.*

#### § 945. When Demurrer to Whole Bill Overruled.

It is an established rule of equity pleading that if a bill is bad in part and good in part, a demurrer to the whole bill cannot be supported. If the plaintiff is entitled to relief in any aspect and in any particular, he has a right to maintain his bill for that relief. Stated in another way, the rule is that a demurrer to the whole bill must be overruled if the pleading demurred to contains any good ground to support it.<sup>54</sup> The formal protestation in a general demurrer

Woodmanse etc. Co. v. Williams (1895) 68 Fed. 489, 15 C. C. A. 520; Westinghouse Air Brake Co. v. New York etc. Co. (1901) 111 Fed. 741.

<sup>50</sup> Stearns v. Page (1940) 1 Story, 204, 207; Hardt v. Heidweyer (1894) 132 U. S. 547, 14 Sup. Ct. 571, 33 L. ed. 548.

<sup>51</sup> Ulman v. Jaeger (1895) 67 Fed. 990, 994.

<sup>52</sup> Beckman v. Hudson River West Shore Ry. Co. (1888) 35 Fed. 3.

<sup>53</sup> Pelham v. Edelmeyer (1883) 15 Fed. 262; Einstein v. Schnabely (1896) 89 Fed. 540.

<sup>54</sup> Buffington v. Harvey (1877) 95 U. S. 99, 24 L. ed. 381; Stewart v. Master-son (1889) 131 U. S. 151, 33 L. ed. 114; Livingston v. Story (1835) 9 Pet. 632, 9 L. ed. 235; Buerk v. Imhaeuser (1861).

does not avoid the force of the rule that a general demurrer must be overruled if any independent part of the bill is good.<sup>55</sup>

Before a general demurrer for want of equity can be sustained, it must be apparent that the bill cannot be sustained in any aspect. A bill may be defective in many respects and vulnerable at many points and yet be good as against any attack from a general demurrer.<sup>56</sup> A general demurrer must be overruled, unless it appears that on no state of the evidence could a decree be made in favor of the plaintiff.<sup>57</sup>

1. *Conklin v. Wehrman* (1889) 38 Fed. 874: In a suit to enjoin an ejectment suit at law and to have plaintiff's title to the land quieted, it appeared that the plaintiff was entitled to the first sort of relief prayed for but not to the other. A general demurrer to the whole bill was interposed. Said the court: "No matter how well taken the objections may be to specific portions of the bill, the demurrer cannot be sustained if the bill as a whole shows ground for relief."

2. *Northern Pac. R. Co. v. Roberts* (1890) 42 Fed. 734, affirmed (1894) 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. 756: The plaintiff sought to have the title to certain lands quieted. It appeared from the bill that the plaintiff had actual possession of only a part of the land in question, possession being essential to the maintenance of such a bill. A demurrer to the entire bill was overruled. The plaintiff, being entitled to maintain the bill as to that portion of land of which he had possession, could prosecute the suit as to such part, though he could not as to the other.

3. *Merriman v. Holloway Pub. Co.* (1890) 43 Fed. 450: In a suit to enjoin the use of an advertising device, the court said: "The difficulty is that the parties demur to the whole bill, and of course if there is any one thing in the bill that is good,—that is to say, if the bill taken altogether entitles the complainant to some kind of relief,—the demurrer should be overruled. If a party in chancery or in a law case wants to demur to a particular part of a bill or declaration, he should not frame his demurrer as is done in this instance, so as to call the whole bill in question."

4. *Pacific Live-Stock Co. v. Hanley* (1899) 98 Fed. 327: A bill to enjoin a diversion of water was demurred to generally, for want of equity, because it did not show specifically and with certainty the date of appropriation by the defendants and that the plaintiff's right was anterior thereto. It appeared that enough was alleged to show that the plaintiff was entitled to relief, and the general demurrer was overruled. The court observed that if the allegations of the bill were not sufficiently definite and certain, the defendant's remedy was by special demurrer.<sup>58</sup>

8 Fed. 457; *La Croix v. May* (1883) 15 Fed. 236; *Mercantile Trust etc. Co. v. R. I. Hospital* (1898) 36 Fed. 863; 41.

*Burnley v. Jeffersonville* (1844) Fed. Cas. No. 2,181; *Heath v. Erie R. Co.* (1871) Fed. Cas. No. 6,306; *Hoamer v. Jewett* (1872) Fed. Cas. No. 6,713; *Brandon Mfg. Co. v. Prime* (1878) Fed. Cas. No. 1,810.

<sup>55</sup> *Atwill v. Ferrett* (1846) 2 Blatchf.

<sup>56</sup> *Maeder v. Buffalo etc. Co.* (1904)

132 Fed. 232; *Perry v. Littlefield* (1879)

Fed. Cas. No. 11,008.

<sup>57</sup> *Failey v. Talbee* (1893) 55 Fed.

892.

<sup>58</sup> If a bill is sufficiently specific and

definite in its charges to entitle a plain-

## § 946. Demurrer Bad in Part Wholly Bad.

It thus appears that a demurrer must always be commensurate with the objectionable feature upon which it is based. If the defect goes to the entire bill, then the demurrer should go to the entire bill. If the defect goes only to a part, the demurrer should be limited to that particular part and feature of the bill. If a demurrer is bad in part it is wholly bad.<sup>59</sup> It has been held that if certain persons are necessary parties in respect to one part of the relief sought but not as to the other parts, a demurrer based on their non-joinder as parties must be limited to that particular relief to the granting of which they would be necessary parties.<sup>60</sup>

If a bill is filed for discovery and relief and the plaintiff appears not to be entitled to the relief, a demurrer to the whole bill can be maintained, the relief being the principal object of the suit and the discovery being sought only in aid of that relief.<sup>61</sup>

## § 947. Formal Irregularities Not Available on General Demurrer.

A general demurrer will be overruled where the only defect of the bill is found to be in the fact that it contains a redundant and repugnant paragraph. However, on overruling such a demurrer, the court, of its own motion, may order the offending paragraph to be stricken out.<sup>62</sup> If an equity cause is erroneously put on the law docket, it is a mere defect of form which supplies no ground for a general demurrer. The case will simply be ordered transferred when attention is directed to the matter.<sup>63</sup>

## § 948. Scope of Special Demurrer.

In drawing a demurrer care should be taken accurately to define its scope. The demurrer must be confined to so much of the bill as con-

tiff to an answer, a general demurrer will not be sustained, though the bill does not particularize nor state the facts with minuteness. *Puget Sound Bank v. King County* (1893) 57 Fed. 433.

<sup>59</sup> *Empire City Amusement Co. v. Wilton* (1903) 134 Fed. 132.

Yet if, in ruling on such a demurrer, the court sustains it as to part and overrules it as to part, the plaintiff waives the defect by amending that part of his bill as to which the demurrer was sustained. *Marshall v. Vickaburg* (1873) 15 Wall. 146, 21 L. ed. 121.

<sup>60</sup> *Heath v. Erie R. Co.* (1871) 8 Blatchf. 347, Fed. Cas. No. 6,306.

<sup>61</sup> *Johnson v. Ford* (1901) 109 Fed. 501.

<sup>62</sup> *Socola v. Grant* (1883) 15 Fed. 487.

A general demurrer has been held to reach the defect that arises from the improper joinder of persons who have no interest in the suit and who consequently should not properly be made parties. *Hubbard v. Manhattan Trust Co.* (1898) 30 C. C. A. 520, 87 Fed. 51, 57; *Hodge v. Railroad* (1899) 1 Dill. 104, Fed. Cas. No. 6,561.

<sup>63</sup> *Dancel v. United Shoe Machinery Co.* (1903) 120 Fed. 839.



tains the defect at which it strikes. If the demurrer goes to a part of the bill, the part to which it is directed must be specified. The following rules embody some practical suggestions that should be borne in mind in drawing demurrers: 1. Never demur to the whole bill, unless the demurrer, if sustained, will destroy the whole bill. 2. Never demur to the whole bill when the point of the demurrer is fatal to a part only of the bill. 3. When the ground of demurrer is destructive of a part only of the bill, confine the demurrer to such part only, and answer the remainder of the bill. 4. Condense each ground of demurrer into a single short and cogent sentence, or proposition.<sup>64</sup>

#### § 949. Precision Required in Special Demurrer.

A special demurrer to specific parts of the bill must point out the parts demurred to with such precision that if an order should be entered for the demurrant in the same terms as are used in the demurrer, such order would not be lacking in certainty; and before an order excising part of a bill can be said to be certain, it must show the precise allegations included in the order.<sup>65</sup>

#### § 950. No Special Demurrer to Prayer for Extraordinary Relief.

A special demurrer to so much of a bill as prays for the writ of *ne exeat* will not lie. This writ is not a distinct remedy but merely a means of effectuating a remedy. By equity rule 91, a plaintiff who contemplates the occasion for the issuance of such a writ pending the suit must pray for it in his bill. Hence if such a prayer is inserted, it supplies no ground for demurrer.<sup>66</sup>

The rule is the same as to an injunction. If the bill states a good cause for relief and also prays for an injunction in aid of that relief, a special demurrer to this prayer will not be entertained. The question as to the propriety of issuing the writ comes up for consideration on the motion for the issuance of the writ, and if the case be not a proper one for injunctive assistance the prayer will be disregarded.<sup>67</sup>

<sup>64</sup> Gibson, *Suits in Chan.* (2d ed.) § 319. <sup>66</sup> *Shainwald v. Lewis* (1895) 60 Fed. 487.

<sup>65</sup> *Chicago, St. L. & N. O. R. Co. v. Macomb* (1880) 2 Fed. 18; *Atwill v. Ferrett* (1846) Fed. Cas. No. 540. <sup>67</sup> *Woodfin v. Phabus* (1887) 30 Fed. 289.

*Formalities Incident to Demurring.***§ 951. Form of Demurrer.**

The demurrer should be entitled with the style of the case, and this should be followed by a proper heading to indicate that the pleading is the demurrer of the particular defendant, or defendants, filing the same. The body of the demurrer should begin substantially thus: The defendant A B demurs to the bill in this cause on the following ground (or grounds).

The demurrer formerly began with a solemn and cumbersome protestation to the effect that the demurrant did not confess any of the matters contained in the bill, and it ended with a wordy wherefore clause containing the prayer for judgment and for a dismissal. The protestation clause is of no effect whatever and the reservation contained in it is entirely idle.<sup>65</sup> This stiff and pompous form is still preserved in the form books designed for the use of practitioners in the federal courts, and it is doubtless still in common use in these courts. It has been generally abandoned in the equity practice of the state courts, and those practitioners who prefer to conform to modern usage do well to discard it.

**§ 952. Language of Demurrer to Be Direct and Concise.**

The purpose of the demurrer is to direct the attention of the court to some conclusive reason why the defendant should not be required to answer the bill or why the plaintiff should not have the relief prayed by him. This reason should be expressed in the most direct, concise, and cogent manner possible. Judge Gibson has well said: "As a rule, the longer the demurrer is, the weaker it is; and the more numerous the causes of demurrer, the less its effect. Sometimes it is well to restate a ground of demurrer in an alternative form; but long demurrers should never be filed. The ground of almost any demurrer may be expressed in five or six lines; and if three or four grounds are not sufficient to destroy the bill, it would be better to answer the bill at once, for it is safe to predict that a longer demurrer will be ineffectual."<sup>66</sup>

<sup>65</sup> The protestation clause usually inserted in the demurrer is merely adopted from the common-law practice, and in equity it has no effect in limiting admissions as to facts properly alleged in the pending suit. *Taylor v. Holmes* (1882) 14 Fed. 498.

<sup>66</sup> Gibson, *Suits in Chan.* (2d ed.) § 319.

**§ 953. Prayer of Demurrer.**

The conclusion of the demurrer should contain a *terras* prayer. If the demurrer is to the whole bill the prayer may be couched in words to the following effect: Wherefore for this [or these] and divers other good causes of demurrer, the defendant prays judgment of the court whether he shall be compelled to answer further, and he prays to be hence dismissed with costs. The reference to divers other good causes of demurrer is properly retained from the old form inasmuch as the right to assign other causes of demurrer *ore tenus* at the argument of the demurrer is recognized in the equity practice of the federal courts. The prayer should be so drawn as to be consistent with the scope of the demurrer itself. For instance, if the demurrer is to a part only of the bill, the prayer should ask judgment of the court whether the defendant shall be required to answer further to that part. If the demurrer is to the whole and not to a part of the bill, the prayer should be whether the defendant shall be required to answer the bill; and in this case the words "or any part thereof" should not be added.<sup>70</sup>

**§ 954. Signature, Certificate, and Affidavit.**

The demurrer must be signed by the solicitor or counsel of the demurrant or by the demurrant himself in person. By the equity practice of the English chancery it was unnecessary for the demurrer to be accompanied by any certificate of counsel or by affidavit of the defendant, since the demurrer relies exclusively on matters apparent on the face of the bill.<sup>71</sup> However, to avoid the trouble and delay incident to the filing of frivolous demurrers, it is declared in equity rule 31 that no demurrer shall be allowed to be filed to any bill, unless upon a certificate of counsel that in his opinion it is well founded in point of law and upon affidavit of the defendant that it is not interposed for delay.<sup>72</sup>

The waiving of defendant's oath to the answer does not operate to waive the affidavit to the demurrer.<sup>73</sup>

**§ 955. Want of Certificate and Affidavit.**

The certificate and affidavit required by rule 31 are not idle formalities, and the courts are inclined to insist rigorously on their

<sup>70</sup> 2 Dan. Ch. Pr. 74.

<sup>71</sup> 2 Dan. Ch. Pr. 77.

<sup>72</sup> Equity Rule 31.

<sup>73</sup> *Dupree v. Leggett* (1903) 124 Fed. 700.

presence. If a demurrer is filed without them, it may be treated as of no validity and effect. If a demurrer lacks either the certificate or the affidavit, the plaintiff may proceed to take a *pro confesso* on the bill, just as if no demurrer at all had been filed.<sup>74</sup>

If the plaintiff prefers, he may move to strike such a demurrer from the file.<sup>75</sup> But a suit will not be reversed on appeal for the erroneous refusal of the court below to strike a demurrer unaccompanied by the requisite affidavit, where it appears that the ground of demurrer is well taken and the point determinative of the suit.<sup>76</sup>

On an application for a preliminary injunction, the defects in a bill pointed out by an uncertified demurrer may be considered by the court, such motion being addressed to the discretion of the court.<sup>77</sup>

#### § 956. Defect Waived by Arguing Demurrer.

If the plaintiff fails to take a *pro confesso* or to move that the demurrer be stricken for lack of the requisite certificate or affidavit, the benefit of the objection may be lost to him. For instance, if the plaintiff sets the demurrer for argument on its sufficiency the court would always allow the defendant to affix the proper certificate or affidavit then and there, when attention is called to the defect at the argument of the demurrer.<sup>78</sup>

Furthermore if a demurrer that lacks the requisite certificate or affidavit is argued and is found to be good, the defendant should have judgment on the demurrer; for if the cause should be remanded to the rules in order that the certificate and affidavit might be affixed, or if the court were to allow the amendment to be made then and there in court, the certificate and affidavit could not add anything to that which already appears, namely, that there was good ground for filing the demurrer and that it was not interposed merely for delay. By going to argument on the demurrer, the plaintiff would appear to waive the defect.<sup>79</sup> Certainly a cause will not be reversed on appeal where the lower court ignores the irregularity and sustains a demur-

<sup>74</sup> *National Bank v. Insurance Co.* 321; *Goodyear v. Toby* (1898) 6 Blatchf. (1881) 104 U. S. 54, 76, 28 L. ed. 658, 130, Fed. Cas. No. 5,585.

<sup>75</sup> *Sheffield Furnace Co. v. Witherow* 702; 149 U. S. 574, 37 L. ed. 853, 13 (C. C. A.; 1902) 55 C. C. A. 54, 118 Sup. Ct. 936; *Secor v. Singleton* (1892) Fed. 32.

<sup>76</sup> *Preston v. Finley* (1896) 72 Fed. 850; *American Steel etc. Co. v. Wire Drawers etc. Union* (1898) 90 Fed. 598.

<sup>77</sup> *Bryant Bros. Co. v. Robinson* (C. C. A.; 1906) 79 C. C. A. 259, 149 Fed. Blatchf. 130.

<sup>78</sup> See *Holton v. Guinn* (1895) 65 Fed. 450.

<sup>79</sup> See *Goodyear v. Toby* (1898) 6 Blatchf. 130.

rer, the same being sufficient in law.<sup>80</sup> But where this irregularity was coupled with the fact that the defendant, in addition to demurring, had filed an answer overruling the demurrer, it was held reversible error for the trial court to dismiss the bill on the demurrer.<sup>81</sup>

### § 957. Filing Demurrer.

After a demurrer is drawn, it is filed, like other pleadings, by leaving it with the clerk of the court.<sup>82</sup> The clerk should mark the pleading as having been filed on the particular day; and he is also required to make an entry, in his order book, of the fact that the demurrer was filed. This operates as constructive notice to the plaintiff of the filing of the demurrer.<sup>83</sup> The mere filing of the demurrer, without the making of such entry, does not constitute notice.<sup>84</sup>

### § 958. Time to Demur.

The time within which a defendant should file his demurrer is the same as that allowed for the filing of a plea or answer, that is to say, the demurrer should be filed on or before the rule day next succeeding that on which the defendant entered his appearance.<sup>85</sup> If the rule day at which a defendant may demur falls on a national holiday, the next succeeding day is the proper time to put in the demurrer, the holiday being *dies non*.<sup>86</sup>

### § 959. Extension of Time for Demurring.

In its discretion, the court will permit a defendant to put in a demurrer after the time allowed by the rule has expired, or will extend the time for the taking of such step. Such permission will be granted almost as of course where the opposite party will not be prejudiced.<sup>87</sup>

An order fixing or extending the time of a defendant to appear and

<sup>80</sup> *Brasoria, County v. Youngstown* 16 of Rules of Circuit Court for N. D. Bridge Co. (1897) 25 C. C. A. 306, 80 California.

<sup>81</sup> *Bryant Bros. Co. v. Robinson* (1906) 79 C. C. A. 259, 149 Fed. 321.

<sup>82</sup> Where the plaintiff amends his bill after demurrer filed the defendant may, if he likes, serve written notice that he elects to have his demurrer on file stand as a demurrer to the amended bill, and the demurrer will be so treated. No.

<sup>83</sup> Equity Rule 4.

<sup>84</sup> *Newby v. Oregon etc. R. Co.* (1870) 1 Sawy. 63, Fed. Cas. No. 10,145.

<sup>85</sup> Equity Rule 18.

<sup>86</sup> *Harvey v. Richmond & M. R. Co.* (1894) 64 Fed. 19.

<sup>87</sup> *Harvey v. Richmond & M. R. Co.* (1894) 64 Fed. 19.

"answer" the bill has been construed as extending the time for demurring. It was observed by the court in this case that a demurrer is an answer in law, though it is not such in the common language of practice.<sup>88</sup>

**§ 960. Demurrer after Plea or Answer Filed.**

The filing of a plea or answer destroys the right to put in a demurrer to the matter covered by the plea or answer. It is too late to demur after a cause has been set for hearing on bill and answer, and a demurrer filed at this juncture without leave of the court will be ignored.<sup>89</sup>

The court will sometimes permit a defendant to withdraw his plea or answer and file a demurrer. Among the considerations that operate on the discretion of the court at the hearing of an application for leave to withdraw an answer and file a demurrer are such as these: Why did not the defendant demur in the first instance? Is not the application itself dilatory? Could not the defense to be raised by demurrer be presented at the final hearing? Would the possible saving of time and expense by allowing the demurrer to be filed compensate for the departure from the orderly course of proceeding? Evidently, such leave should not be lightly granted. If the defendant proposes by his demurrer to raise a question of a purely formal defect, such as is usually waived by answering to the merit, his application would certainly not be granted; while if he proposes a demurrer going to a matter of substance, the same defense would be available at the final hearing. The circumstance that, after withdrawing his answer and demurring, the defendant, in the event of losing on demurrer, would again have a right to answer, is a sufficient argument against allowing him to withdraw the answer in any doubtful case. If, however, it appears to the court on mature deliberation that the proposed demurrer is entirely good, there is no reason why the answer should not be withdrawn and the demurrer interposed. The proceedings are thus terminated at once. In all cases the question is one within the discretion of the court. If justice can probably be as well done by pursuing the usual course, the defendant, having first elected to answer to the merits, will be required to try on the merits.<sup>90</sup>

<sup>88</sup> *New Jersey v. New York* (1832) 6 Pet. 323, 8 L. ed. 414.

<sup>89</sup> *Newman v. Moody* (1894) 19 Fed. 858.

<sup>90</sup> *Phelps v. Elliott* (1887) 30 Fed. 396.

*Argument of Demurrer.***§ 961. Setting Demurrer for Argument.**

A formal joinder in the demurrer, such as was familiar in common-law pleading, is not required in courts of equity. Instead the plaintiff is required to set the demurrer down for argument.<sup>91</sup> This step, like the setting of a plea for argument, should be taken on or before the rule day next succeeding that on which the demurrer is filed.

The failure of the plaintiff to set the demurrer for argument within this time operates as an admission of the sufficiency of the demurrer and entitles the defendant to a dismissal as of course, unless the court, or judge, allows further time.<sup>92</sup>

What constitutes the setting of a demurrer down for argument is not expressly defined by the equity rules. According to the English practice, a demurrer was set down for argument by an *ex parte* order, issued on petition of the plaintiff and served on the defendant's solicitor two days before the hearing. This practice is not followed in the federal courts; but on the contrary, the party wishing to set the demurrer down for argument does so by motion entered by the clerk in the order book. The motion is grantable as of course, and the entry of it operates as sufficient notice to the parties and their solicitors.<sup>93</sup>

The mere filing of a demurrer does not make it ready for argument. It must be regularly set for argument in conformity with the practice of equity courts. Under a local rule requiring causes to be put on the calendar for hearing when they are ready for argument on demurrer, a cause should not be entered on the calendar when the demurrer is first filed but only when the cause is actually set for argument on the demurrer.<sup>94</sup>

**§ 962. Waiving Benefit of Demurrer.**

A demurrer may be abandoned by the party who puts it in, and a presumption that it is abandoned arises from the taking of steps inconsistent with an intention to rely thereon. One who answers and goes to hearing on the merits is held thereby to have abandoned a

<sup>91</sup> Equity Rule 33.

<sup>94</sup> *Gillette v. Doheny* (1895) 65 Fed.

<sup>92</sup> Equity Rule 38; *Gillette v. Doheny* 715.

(1895) 65 Fed. 715, 716.

<sup>93</sup> *Gillette v. Doheny* (1895) 65 Fed.

715,

demurrer previously filed. In such case it is not necessary that the record should show what disposition was made of the demurrer.<sup>95</sup>

**§ 963. Disposing of Demurrer—Judicial Discretion.**

If the demurrer has the proper scope and it appears on the argument that the objection pointed out therein is a valid one, the court will usually sustain the demurrer, otherwise not. However, in disposing of demurrers the court has a certain amount of judicial discretion to be exercised in furtherance of justice; and where the nature of the case stated in the bill is such as to make it probably more conducive to the cause of justice to decide such case only after answer and proof, it is within the discretion of the court to refuse to determine it on demurrer, though the demurrer may appear to be technically well grounded.<sup>96</sup> Under these conditions, the practice is to overrule the demurrer with leave to rely upon it in the answer, —a recourse very frequently adopted indeed.<sup>96a</sup> In no case will a matter be determined on demurrer where the issue is confusing and the court has doubts. To obtain the decision of a question on demurrer, the demurrant must show a well-defined issue on which a definite and precise conclusion can be independently reached without regard to other issues whatever.<sup>97</sup> On the other hand, where it is manifest that, on the whole record, the plaintiff has no cause of action and that to sustain the bill on demurrer would merely lead to an unprofitable expenditure of time and money by the plaintiff, the bill will be dismissed.<sup>98</sup>

**§ 964. Reserving Demurrer to Final Hearing.**

A good illustration of the situation where a demurrer may well be overruled in the discretion of the court, with leave for the defendant to rely on the same in his answer, is presented in the case where a demurrer to a bill for the infringement of a patent raises the question of the novelty of the patent. This question cannot be fairly and

<sup>95</sup> *Bacey v. Gallagher* (1874) 20 Wall. 670, 22 L. ed. 452; *Townsend v. Jemison* (1849) 7 How. 717, 12 L. ed. 885.

<sup>96</sup> *Snyder v. The De Forest Wireless etc. Co.* (1907) 154 Fed. 142.

<sup>96a</sup> *Rankin v. Miller* (1904) 130 Fed. 229.

<sup>97</sup> *Ulman v. Jaeger* (1896) 67 Fed. 980; *Strawberry Hill v. Chicago etc. R. Co.* (1890) 41 Fed. 568; *Pettit v. Hope* (1890) 2 Fed. 623.

<sup>98</sup> So held in a case where the equity of the bill depended on the truth of an assertion that if relief were not granted, a certain injurious act would be done to plaintiff in the future. The court concluded that there was no good ground to anticipate such consequence and dismissed the bill. *Hutton v. Bancroft* (1897) 83 Fed. 17.



justly settled on demurrer. Its solution would be governed to some extent by the construction put upon the claims of the plaintiff's patent, and whether these should be construed narrowly or broadly would sometimes depend on the prior state of the art. Furthermore, expert testimony might be required to aid in settling it. To attempt to adjudicate such a question would be hazardous to the rights of the respective parties. Such a demurrer will therefore be overruled with leave.<sup>99</sup>

A question that is not material on the preliminary question of the right of action will not be passed upon on demurrer.<sup>100</sup> Where a demurrer is directed chiefly to the matter of the jurisdiction of the court and that point is decided favorably to the entertainment of the suit by the court, another question, which can be more properly determined at the hearing, will not be settled on demurrer but will be left open till the hearing.<sup>101</sup>

A demurrer will not be sustained to a bill in double aspect, where the demurrer is directed only to the relief sought under one aspect and the situation is such that the question raised by the demurrer can be more properly determined at the hearing.<sup>102</sup>

### § 965. Certainty of Bill as Affecting Disposition of Demurrer.

When a demurrer is interposed raising the question whether the bill makes out a case for relief on the merits, and the allegations of the bill are somewhat lacking in definiteness and precision, the demurrer will be overruled, if the statements are such as to support the case in any aspect. Here the attitude of the court is to let the cause go on to hearing and to see what the plaintiff can make out of it on the proof. In the decision of such question, we constantly read such observations as this: "It cannot be said upon demurrer that the averments of the bill do not state a cause of action."<sup>103</sup> In order to support a demurrer the court will not strain judicial knowledge to cover a point which should be more properly determined after the facts are fully developed.<sup>104</sup> General demurrers are not looked on with favor when interposed to a bill charging fraud and conspiracy.<sup>105</sup>

<sup>99</sup> *Star etc. Co. v. Klahn* (1906) 145 Fed. 834. <sup>103</sup> See, e. g., *Hubbard v. Manhattan Trust Co.* (1898) 30 C. C. A. 520, 87 Fed. 59.

<sup>100</sup> *Savings & Trust Co. v. Bear Valley Irr. Co.* (1902) 112 Fed. 693. <sup>104</sup> *Miller v. Ahrens* (1907) 150 Fed. 644, 648.

<sup>101</sup> *Virginia v. West Virginia* (1907) 206 U. S. 290, 51 L. ed. 1068. <sup>105</sup> *Jahn v. Champagne Lumber Co.* (1906) 147 Fed. 631.

<sup>102</sup> *Strawberry Hill v. Chicago etc. R. Co.* (1890) 41 Fed. 668.

**§ 966. Plaintiff's Right to Amend Where Demurrer Sustained.**

Upon sustaining a demurrer the court will, on motion, usually allow the plaintiff to amend his bill, if the defect pointed out by the demurrer appears to be such as could be cured by amendment. The order usually is that the plaintiff amend within a specified time, otherwise the bill to be, or stand, dismissed. The time to be allowed for amendment is within the discretion of the court, and will be fixed to suit the exigencies of the particular situation.<sup>106</sup>

The defendant is of course entitled to his costs when his demurrer is allowed, and the court may further impose reasonable terms on the plaintiff in allowing him to amend.<sup>107</sup>

**§ 967. Discretion of Court.**

After a demurrer going to the merits of the bill has been sustained, it is largely, if not wholly, in the discretion of the trial court to allow an amendment or not; and if it appears that the plaintiff's case is incurable and that no amendment could be made that would justify relief, the amendment will not be permitted. Nor will the supreme court reverse an order refusing to permit an amendment unless there clearly appears to have been an abuse of discretion. Furthermore, it seems that in no case would the supreme court reverse such an order where the particular amendment offered and refused is not incorporated in the record; for unless this is done, the court cannot see that the proposed amendment contains sufficient matter to entitle the plaintiff to relief.<sup>108</sup>

If the plaintiff elects to stand on his bill and makes no application for leave to amend, a decree is entered dismissing the bill without more ado.<sup>109</sup>

**§ 968. Answer after Demurrer Overruled.**

If a demurrer is overruled and disallowed, the defendant will be ordered to answer the bill, or so much thereof as is covered by the demurrer, by the next rule day or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, reasonably be done. In default of

<sup>106</sup> See the order in *Bishop v. York* (1902) 118 Fed. 352; *Bishop v. Leonard* (1902) 123 Fed. 981; *Polk v. Mutual etc. Assn.* (1902) 119 Fed. 491. <sup>107</sup> Equity Rule 35. <sup>108</sup> *United States v. Atherton* (1890) 102 U. S. 372, 26 L. ed. 213. <sup>109</sup> *Headrick v. Larson* (C. C. A.; 1907) 81 C. C. A. 378, 152 Fed. 94.

such answer a *pro confesso* will be taken, and the cause will be proceeded with *ex parte*.<sup>110</sup>

### § 969. Costs and Terms.

The plaintiff is entitled to his costs in the cause up to the time the demurrer was overruled, unless the court is satisfied that the defendant had good ground, in point of law or fact, to interpose the same, and that it was not interposed vexatiously or for delay.<sup>111</sup> In a case where the court thought that the demurrer had obviously been interposed for delay and not in good faith, an order was passed allowing the defendant to answer only upon the payment of the taxable costs and the payment, in addition, of a further sum to cover the expenses to which the plaintiff had been put by the interposition of the demurrer.<sup>112</sup>

### § 970. Order Sustaining Demurrer to Part of Bill.

Where two demurrers are filed, one going to the entire bill and one to a part only, and the former is overruled, but the latter sustained, a decree should be entered dismissing the bill as to that part covered by the effective demurrer but overruling the demurrer to the other parts of the bill and requiring the defendant to answer thereto.<sup>113</sup>

### § 971. Defendant's Election to Stand on Demurrer.

Where a demurrer is overruled and the defendant refuses to plead or answer further, he is thereby said to stand on his demurrer. If he signifies his election to stand on his demurrer, a decree can forthwith be entered, ordering the bill to be taken for confessed; but if, as usually happens, such election is not asserted in court, the *pro confesso* will be taken only after the defendant has failed to comply with the order of the court requiring him to answer. After a final decree has been entered on the bill as confessed, the defendant can take the cause up by appeal. The appellate court then has to determine primarily the question whether the demurrer was rightly overruled, and secondly, supposing the action of the lower court to be

<sup>110</sup> Equity Rule 34.

By rules of practice of the Circuit Court for the Northern District of California, the defendant is allowed ten days from the time of the service of written notice of the overruling of the demurrer within which to answer to the merits

as of course. No. 15 of Rules of that court.

<sup>111</sup> Equity Rule 34.

<sup>112</sup> *Merrimac etc. Co. v. Schlesinger* (1903) 124 Fed. 237.

<sup>113</sup> *Powder Co. v. Powder Works* (1878) 98 U. S. 126, 25 L. ed. 77.

correct on that point, whether the subsequent proceedings were in conformity with correct principles of equity pleading and practice.<sup>114</sup>

If a defendant who demurs and answers elects to abide by the demurrer and for that reason refuses to take proof, he will not at the hearing be granted leave to put in proof.<sup>115</sup>

**§ 972. Conclusiveness of Issue Presented by Demurrer.**

Where a demurrer is once overruled with leave to answer, but without leave for the defendant to incorporate the same demurrer in his answer, the defendant cannot rely upon it again; and if he again files with his answer a demurrer relying on the same matters, the demurrer will be stricken.<sup>116</sup>

<sup>114</sup> *Davis v. Gray* (1873) 16 Wall. 216, 21 L. ed. 452.      <sup>116</sup> *Fuller v. Knapp* (1895) 24 Fed. 100.

<sup>115</sup> *Orendorf v. Budlong* (1882) 12 Fed. 24 (case of little value).

## CHAPTER XXIII.

### COMPATIBLE DEFENSIVE PLEADINGS.

#### *Concurrent Use of Demurrer, Plea, and Answer.*

- 973. Normal Sequence of Defensive Pleadings.
- 974. Stronger Pleading Overrides Weaker.
- 975. Demurrer, Plea, and Answer to Same Bill.
- 976. Pleading Must Not Be Too Narrow.
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- 978. Pleadings Incompatible if Both Directed to Whole Bill.
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- 980. Plea and Answer Setting Up Different Defenses.
- 981. Plea to Jurisdiction Not Overruled by Answer.
- 982. Withdrawing Answer to Rely on Plea.
- 983. Testing Compatibility of Different Pleadings.

#### *Answer in Support of Plea.*

- 984. Matter of Discovery in Answer Does Not Overrule Plea.
- 985. Discovery as Affected by Resort to Plea.
- 986. Discovery Not Needed on Affirmative Plea.
- 987. Discovery Necessary on Negative and Anomalous Pleas.
- 988. Answer in Support of Plea.
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- 991. Bill Setting Up Equitable Circumstances Fatal to Plea.
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- 994. Concurrent Use of Supporting Answer and Other Pleadings.
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- 1006. Excepting to Answer for Insufficiency.
- 1007. Summary—Six Propositions.
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*Plea or Demurrer Incorporated in Answer.*

- § 1009. Answer May Embody Matter of Plea or Demurrer.
- 1010. Discovery as Affected by Incorporation of Plea in Answer.
- 1011. Affirmative Plea Embodied in Answer.
- 1012. Negative or Anomalous Plea Embodied in Answer.
- 1013. Mode of Pleading Matter of Plea in Answer.
- 1014. Rule 39 Inapplicable Where Separate Plea Overruled and Incorporated in Answer.

*Concurrent Use of Demurrer, Plea, and Answer.*

**§ 973. Normal Sequence of Defensive Pleadings.**

In the preceding chapters we have dealt successively with the three defensive pleadings available to the defendant, namely the answer, the plea, and the demurrer. The order adopted has been determined by considerations of convenience and economy of treatment, and this sequence does not conform to the order in which the defendant must in practice utilize these respective forms of defensive pleading. The purpose of both the demurrer and plea is to cut the proceedings off and to obtain judgment in favor of the defendant in the early stages of the suit, thereby relieving the defendant from giving discovery and obviating the necessity of going into the full merits of the cause. It follows that these forms of defensive pleading are always resorted to before answering. Furthermore, it is logical that the demurrer should precede the plea, for the demurrer raises a bare issue of law and depends on no other facts than those stated in the bill. The practical order in which the several defensive pleadings are utilized is, therefore, demurrer, plea, answer.

**§ 974. Stronger Pleading Overrules Weaker.**

The adoption of this order is fortified and even made necessary by the existence of an important principle of pleading to the effect that a pleader who departs from this sequence thereby waives the right to resort to any mode of defense that he passes over. The answer is the most favored of all modes of defense, and as a pleading it is superior to either the plea or demurrer. The plea is more favored than the demurrer, and as a pleading it is, therefore, superior to the demurrer. As the weaker and less favored mode of defense must always yield to the stronger and more favored, it follows that a plea will overrule a demurrer; and an answer will always overrule either a demurrer or a plea, or both. Put in another way, the rule is that one who resorts to a stronger mode of defense thereby waives the right to resort to a

weaker mode of defense; or if the weaker pleading has already been put in, he thereby waives the right to rely upon it. This applies whether the respective pleadings go to the whole bill or to one or more parts of it. In every case where an answer covers the same ground as a plea or demurrer, and where a plea covers the same ground as a demurrer, the plea or demurrer, as the case may be, is overruled.

### § 975. Demurrer, Plea, and Answer to Same Bill.

The principle that the stronger pleading waives and overrules a weaker pleading applies only where the two pleadings cover the same ground. Consequently, if a bill embraces two or more causes of action, or one cause of action susceptible of being divided into two or more elements the defendant may, as to each cause of action, or each distinct part of a single cause of action, adopt the particular mode of pleading best suited to his defense. He may, in such case, if he sees fit, demur to one part, plead to another, and answer to still another. In other words, he may demur, plead, and answer to different parts of the bill at the same time.<sup>1</sup> As it is put in equity rule 32, "the defendant may at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue."

Furthermore, as a defendant is legally bound to respond to the whole case made in the bill, it is his duty, where one species of pleading is directed to a part only, to supplement that defense by some other pleading covering the residue of the bill.

### § 976. Pleading Must Not Be Too Narrow.

A defendant who undertakes to set up different defenses by two or more different modes of pleading, should first assure himself that the case stated in the bill is really resolvable into distinct elements to which his several modes of defense are really appropriate. Furthermore, he must take care, in drawing his pleadings, that each shall be directed to all of that particular part, and no more, to which it is intended to apply and to which it ought to extend. On general principles, a plea or demurrer would be overruled, if it were found to be in fact less extensive than that part of the bill to which it was intended to apply and to which it ought to extend. However, to

<sup>1</sup> *Livingston v. Story* (1835) 9 Pet. 632, 658, 9 L. ed. 255, 264.

avoid unnecessary technicality at this point it is provided in equity rule 36 that "no demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to."<sup>2</sup>

**§ 977. Pleading Must Not Be Too Broad.**

As the defendant should guard against making his pleadings too narrow, so should he take care that they are not too broad. There should be no overlapping of the different pleadings. Under the English practice, a weaker pleading was overruled by a stronger pleading that overlapped and covered a material part of the ground occupied by the weaker, to the same extent as if it covered the whole of that ground.<sup>3</sup> It is possible that this doctrine is still theoretically applicable in the federal courts where a plea extends to part of the ground covered by a demurrer; but as regards the effect of an answer that overlaps a part, but not all, of the ground covered by a plea or demurrer, the doctrine stated is materially changed by an equity rule as follows:<sup>4</sup>

Equity Rule 37: No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.<sup>5</sup>

The rule in question was evidently intended to apply only in cases where the plea extends merely to a part of the bill and where the answer is intended to cover the residue but by inadvertence of the pleader is somewhat more extensive.<sup>6</sup> There was plainly no intention directly to encourage loose habits of pleading.

**§ 978. Pleadings Incompatible if Both Directed to Whole Bill.**

Moreover the rule does not sanction any practice whereby any one may demur to the whole bill, plead to the whole bill, and answer to

<sup>2</sup> Adopted from Eng. Ord. in Chan. (Aug. 26, 1841) No. 36.

<sup>3</sup> "It has been adopted as an invariable rule that an answer to any part of a bill demurred to will overrule the demurrer, even though the part be immaterial." 2 Dan. Ch. Pr. 75.

<sup>4</sup> This rule was adopted from Eng. Orders in Chan. (Aug. 26, 1841) No. 37. Under the rules of 1822, there was no rule similar to number 37 of the rules of 1842. Hence, under those prior

rules the federal practice conformed to the earlier English practice and a plea or demurrer was overruled by an answer covering part of the same ground. *Stearns v. Page* (1840) 1 Story 204; *Ferguson v. O'Hara* (1818) Pet. C. C. 493.

<sup>5</sup> *Pierpont v. Fowle* (1846) Fed. Cas. No. 11,152.

<sup>6</sup> *Huntington v. Laidley* (1807) 70 Fed. 865, 867.



the whole bill; or whereby he may demur and plead, or demur and answer, or plead and answer, to the whole bill at once.<sup>7</sup> It results that, notwithstanding equity rule 37, a demurrer or plea to the whole bill is still, as heretofore, overruled by an answer to the whole bill.<sup>8</sup> But a demurrer to the whole bill filed by one defendant is not overruled by the answer or plea of his co-defendant to the whole bill.<sup>9</sup>

### § 979. Demurrer or Plea to Part Incompatible with Answer to Whole.

Furthermore it is still true, as a general principle, that a demurrer or plea to part of a bill is overruled by an answer of the same defendant to the whole bill, for such an answer inevitably covers all the ground covered by the demurrer or plea.<sup>10</sup>

*Grant v. Phoenix Ins. Co.* (1887) 121 U. S. 105, 30 L. ed. 905: A plea raising the defense of usury and a plea of payment were interposed to a bill to foreclose deeds of trust. At the same time, the defendant filed an answer setting up usury and payment, among other defenses. The pleas were held to be overruled, because their ground was wholly covered by the answer.

### § 980. Plea and Answer Setting Up Different Defenses.

If a defendant pleads one defense by plea and also answers to the whole bill but sets up a defense, or defenses, in the answer different from that stated in the plea, the plea is thereby technically overruled to the same extent as if the answer had embodied the same defense as the plea. However, as the court of equity is not inclined to discourage any honest defense, it will not ordinarily overrule such plea or order it stricken in general terms; but if the defense exhibited in the plea appears to have any merit, the court will pass an order that the plea be incorporated in the answer, or that the plea stand as part of the answer.<sup>11</sup> It is not technically correct to allow the plea to stand, as a plea, with the answer; but this has sometimes been done.<sup>12</sup>

<sup>7</sup> *Crescent City Co. v. Butchers Co.* No. 13,796; *Sims v. Lyle* (1822) 4 Wash. (1882) 12 Fed. 225; *Adams v. Howard* C. C. 301, Fed. Cas. No. 12,891. *Contra*, (1881) 9 Fed. 347; *United States v. Hayes v. Dayton* (1880) 8 Fed. 702.

*American Bell Telephone Co.* (1887) 30 Fed. 523; *Strang v. Richmond etc. R. Co.* (1890) 41 C. C. A. 474, 101 Fed. 511.

<sup>8</sup> *Fuller v. Knapp* (1885) 24 Fed. 100; *Marshall v. Otto* (1893) 59 Fed. 249; *Hudson v. Randolph* (1894) 66 Fed. 216.

<sup>9</sup> *Strang v. Richmond etc. Co.* (1890) 101 Fed. 511, 515; *Crescent City Live Stock etc. Co. v. Butchers' Union etc. Co.* (1882) 12 Fed. 225.

<sup>11</sup> *Lewis v. Baird* (1842) 3 McLean, 56, Fed. Cas. No. 8,316. "Where one defense is made by the plea, and another by the answer, the plea will be ordered to stand for an answer."

<sup>12</sup> *In Mercantile Trust Co. v. Mis-*

§ 981. Plea to Jurisdiction Not Overruled by Answer.

A plea in abatement to the statutory jurisdiction of the court is not overruled by an answer to the merits.<sup>13</sup> This results from the peculiar organization of the federal courts and from the fact that objection for defect of statutory jurisdiction can now be made at practically any time. Besides, the defect arising from want of statutory jurisdiction cannot be waived.

§ 982. Withdrawing Answer to Rely on Plea.

When an answer is inadvertently drawn in such fashion as to cause it to overrule a plea on which the defendant wishes to rely, the court will sometimes entertain an application for leave to withdraw the answer or so much of it as may be necessary to restore the plea. Such a motion will not be entertained where it fails to specify the particular part of the answer which the defendant proposes to withdraw.<sup>14</sup>

§ 983. Testing Compatibility of Different Pleadings.

Where a demurrer, plea, and answer, or any two of them, are filed in any case to a bill, and the plaintiff wishes to raise the question whether they are compatible, and whether one is not overruled by the other, a proper proceeding is by motion to strike from the files the pleading that is supposed to be overruled.<sup>15</sup> But the plaintiff may, if he prefers, make a special motion to disallow the demurrer or plea,<sup>16</sup> or he may move to compel the defendant to elect as to the particular pleading on which he proposes to stand.<sup>17</sup>

We perceive no very good reason why the plaintiff should not be permitted to raise the question whether a demurrer or plea has been overruled by the filing of an incompatible pleading, by setting the

souri etc. R. Co. (1896) 84 Fed. 379, the court allowed a plea to stand where it set up a slightly different defense from that stated in the answer, though the answer went apparently to the whole bill.

<sup>13</sup> See *Playford v. Lockard* (1895) 65 Fed. 870.

<sup>14</sup> *Ferguson v. O'Harra* (1818) Pet. C. C. 493, Fed. Cas. No. 4740.

<sup>15</sup> *Huntington v. Laidley* (1897) 79 Fed. 865; *Mercantile Trust Co. v. Missouri etc. R. Co.* (1898) 84 Fed. 379.

<sup>16</sup> *Ferguson v. O'Harra* (1818) Pet. C. C. 493.

<sup>17</sup> *Hayes v. Dayton* (1880) 8 Fed. 702; *Adams v. Howard* (1881) 9 Fed. 347. In the latter case it was intimated that if the defendant, when forced to such an election, should choose to stand on his demurrer and it should be overruled, he would perhaps thereby lose the right to answer over, which is ordinarily incident to the overruling of a demurrer,—a suggestion of doubtful validity.

demurrer or plea down for argument on its sufficiency,<sup>18</sup> but it has been casually held, in one case, that if a plaintiff submits the cause for argument on the sufficiency of a demurrer or plea, he thereby waives the right to rely on the fact that such pleading has been overruled by some other pleading.<sup>19</sup>

The filing of exceptions to the sufficiency of an answer accompanying a demurrer to a part of the bill operates as an admission of the sufficiency of the demurrer. The plaintiff should therefore always make sure to have the demurrer argued and disposed of before excepting to the answer.<sup>20</sup>

### *Answer in Support of Plea.*

#### **§ 984. Matter of Discovery in Answer Does Not Overrule Plea.**

The rule by which a plea is held to be overruled by an answer covering the same ground as the plea, has reference solely to matters of defense. It has no application to matter of discovery contained in the answer. An answer containing discovery only cannot overrule a plea.<sup>20</sup> In fact, as we are now to learn, it is absolutely necessary in certain cases that a plea should be accompanied by an answer containing discovery as to the matters embraced in the plea. In this situation the plea is said to be supported by the answer, and the answer is said to be in support of the plea. The problem now before us is to discover the conditions under which this support is necessary and the nature and mutual relations of such plea and answer respectively.<sup>21</sup>

#### **§ 985. Discovery as Affected by Resort to Plea.**

In the theory of equity pleading, as originally established, every bill is a bill of discovery. The plaintiff states facts constituting the

<sup>18</sup> See *Armstrong v. Soudert* (1896) 27 Fed. 247.

<sup>19</sup> See *Hayes v. Dayton* (1890) 8 Fed. 702.

<sup>20</sup> *Hatch v. Bancroft-Thompson Co.* (1895) 67 Fed. 802, 804, 2 Dan. Ch. Pr. 77.

<sup>21</sup> Langdell, *Eq. Pl.* 103.

The reader is here admonished that, in dealing with this subject, the author has seen fit to rely to a large extent on books of recognized authority on matters of equity pleading and practice.

The decisions of the federal courts are not a safe guide here; and one who attempts to follow them is not unlikely to be led totally astray. Although some of those decisions are cited where they seem to be pertinent, little reliance should be placed on the discussions and dicta contained in them. It would be unfair to suggest that this unsatisfactory condition of judicial authority is peculiar to the federal decisions. The decisions of other courts exhibit the same defects.

basis of the relief sought by him, and he calls on the defendant to answer all the allegations of the bill. A response of the defendant, by way of discovery, to these allegations is something that the plaintiff is always entitled to have. This discovery he usually gets, of course, in the defendant's answer; but if the defendant, instead of answering, resorts to a plea, a question at once arises as to the effect of this proceeding on the right of the plaintiff to have discovery. In order to answer this, it will be necessary to bear in mind the nature and effect of the three different sorts of pleas.

**§ 986. Discovery Not Needed on Affirmative Pleas.**

The pure and affirmative plea, as we have seen, sets up some new matter, *dehors* the bill, and seeks to defeat the suit by reason of such matter. In legal effect it admits all the allegations of the bill to be true to the same extent and in the same degree that a demurrer would admit them to be true. Plainly the use of such a plea is in no way prejudicial to the right of the plaintiff to have discovery, for all the allegations of the bill being admitted, there is nothing left about which discovery could be desired.

**§ 987. Discovery Necessary on Negative and Anomalous Pleas.**

Negative and anomalous pleas differ from the affirmative plea in the important respect that they are not founded, as is the latter, exclusively on some new matter of defense imported into the record. The negative plea is a denial of some single fact that is stated in the bill and that is necessary to make out the plaintiff's case. The anomalous plea, though not wholly negative, is partly so, since it always contains a denial of the matter set forth in the bill to avoid the defense anticipated by the plaintiff. Now, it is plain that if the negative and anomalous pleas were admitted on an equal footing with the affirmative plea, the right of the plaintiff to have discovery would be violated. In so far as a plea is negative, it is directed to matter contained in the bill; and as to all such matters the plaintiff is entitled to discovery. Of course the courts could not afford to countenance the introduction of a pleading that would prejudice the plaintiff in so important a right. They were therefore confronted with the necessity of either rejecting negative and anomalous pleas altogether, or of admitting them under such conditions as would render them unprejudicial to the plaintiff.

### § 988. Answer in Support of Plea.

A solution of the problem was found in the adoption of a requirement that negative and anomalous pleas must be accompanied by an answer giving the plaintiff the discovery to which he is entitled.<sup>23</sup> This means, of course, that the answer in support of the plea should be directed to and should answer those matters in the bill that are controverted by the negative plea or by the negative part of the anomalous plea. Other matters in the bill should not be answered, because they are immaterial on the issue made by the plea, and the very purpose of the plea is to avoid the necessity of giving discovery about those matters.

It may be imagined that a still simpler solution could have been found in the adoption of a rule to the effect that the needed discovery should be given in the very plea itself, without requiring it to be put into an independent and separate answer. But it must be remembered that a plea is not a proper vehicle of discovery. It is a pure pleading, and it has never been considered to be a proper subject of exceptions for insufficiency.<sup>24</sup>

### § 989. When Such Answer Necessary.

From what has just been said it will be manifest that an answer in support of a plea is never necessary unless the plea is a plain negative plea or contains a negative feature such as is found in the anomalous plea. We have seen that the anomalous plea can appear under various conditions. The normal type of the bill to which such a plea is proper is that in which the plaintiff refers to an anticipated defense by way of pretense, and then sets up equitable circumstances to avoid it. In another type of bill requiring the anomalous plea there is an absence of any explicit reference to the pretended defense in the bill, but the bill nevertheless contains matter that would defeat the plea, if one should be interposed.

The situations, then, in which a plea must be supported by an answer are principally three: (1) Where the defendant's plea denies some allegation in the bill necessary to the relief prayed by the plaintiff. Here we have the simple negative plea.<sup>24</sup> The supporting answer must here respond to all the charges of the bill that tend to

<sup>23</sup> *Sanders v. King* (1821) 6 Madd. Ch. 61. This seems to be the first case in which the necessity for an answer in support of a negative plea was recognized.

<sup>24</sup> 2 Dan. Ch. Pr. 112.

<sup>24</sup> *Dwight v. Central Vermont R. Co.* (1881) 9 Fed. 785, 788, 20 Blatchf. 200.

disprove or otherwise invalidate the plea. (2) Where the plaintiff admits the existence of a legal bar, but alleges some equitable circumstances to avoid the effect of the bar. Here the plea is anomalous; and the defendant, after setting up the bar in his plea and also denying therein the equitable circumstances in avoidance of it, must, in his answer, respond to and deny all the equitable circumstances charged in the bill tending to defeat or invalidate the plea. (3) Where the plaintiff does not admit the existence of any legal bar, but charges equitable circumstances that would defeat a plea, if the same were interposed. Here the plea is again anomalous; and it is necessary for the defendant, in his plea, to set up the affirmative matter and to deny the matter in avoidance thereof. In addition, he must put in an answer denying those evidentiary matters and circumstances that tend to defeat the affirmative defense relied on.<sup>25</sup> The ordinary plea in equity of the statute of limitations is a pure plea and need not be supported by an answer, but if the bill anticipates the defense of the statute and alleges equitable circumstances to rebut the bar, the plea should be supported.<sup>26</sup>

When a plea is supported by an answer we are confronted with a phenomenon that is rather exceptional in equity pleading, for here we perceive a complete separation of the two elements of pleading and discovery. The plea is all defense, and the answer in support of it is all discovery. "The defense is the matter set up by the plea; the answer is that evidence which the plaintiff has a right to require and to use to invalidate the defense made by the plea."<sup>27</sup>

#### § 990. Necessity for Support Determined by Real Character of Plea.

A plea, though affirmative in form, must be supported by an answer, if the plea is really a negative plea or serves the purpose of a negative plea. For instance, if a bill alleges that a certain woman died without issue, and a plea is put in averring that such person left one child, to wit, the defendant C, as her sole issue, the plea is negative in effect, though affirmative in form, and requires an answer in support.<sup>28</sup>

*Per contra*, a plea, though negative in form, need not be supported

<sup>25</sup> Gibson, *Suits in Chan.* (2d ed.) 341. The reader will, at this juncture, be assisted to a better understanding of the situations requiring an answer in support of a plea, if he will refer to the descriptions of anomalous pleas farther back. See ante, §§ 841-845.

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<sup>26</sup> *West Portland etc. Ass'n v. Lowme*, 17 Fed. 206.

<sup>27</sup> 2 Dan. Ch. Pr. 132.

<sup>28</sup> *Hunt v. Penrice* (1863) 17 Beav. 525.

by an answer, if the plea is really an affirmative plea or serves the purpose of such a plea. Thus, if the bill alleges, as a ground of jurisdiction, that the plaintiff is a citizen of a particular state, and a plea to the jurisdiction avers that he is not a citizen of that state but of another state, the plea need not be supported by an answer. Here the effect of the plea depends mainly on the affirmative averment that the plaintiff is a citizen of the particular state mentioned in the plea, and the denial of citizenship in the state stated in the bill is only casual and incidental to the other averment.<sup>30</sup>

### § 901. Bill Setting Up Equitable Circumstances Fatal to Plea.

It may be observed that in practice very little trouble arises over the matter of putting in a supporting answer in either the first or second situation above mentioned. If the plea is clearly negative, or if the bill is such as clearly to call for the anomalous plea, as in (2), the course to be pursued by the defendant is plain. In the situation contemplated in (3), the problem is a more difficult one, and the limits to which the plea and answer respectively should extend are more difficult to discover. No improvement can, perhaps, be made on the formula given by Mr. Daniell as applicable to this situation.

2 Daniell, Chancery Practice, 115: "Where no ostensible bar be in the bill admitted to exist, and yet the defendant would plead in bar to the bill, he must distinguish those facts which, if true, would not invalidate or disprove his plea, and plead to the relief and discovery sought as to them, and then answer to the facts, which, if true, would disprove or invalidate his plea; and also to those matters which are specially alleged as evidence of such facts."

The following decision is in point. It was here held that an anomalous plea was necessary—though it was not described by that name—and it was held that a supporting answer was necessary; yet the charges of equitable circumstances in the bill were not introduced in the bill with a view to any anticipated defense. Those circumstances were merely stated as a part of the transaction on which the litigation was based. It was necessary to answer them because they constituted evidentiary facts that tended to defeat the plea, and because as to them the plaintiff was entitled to discovery.

*Roche v. Morgell* (1909) 2 Sch. & Lef. 721, 726: The bill was for an account of various dealings and transactions between the plaintiff and defendant, imput-

<sup>30</sup> See *McDonald v. Salem etc. Co.* court miss the point in saying: "This (1887) 31 Fed. 577, 578. Did not the is simply a negative plea, and does not

ing fraud and unfair dealing, and various usurious charges, overcharges, and mistakes in accounts delivered. The defendant pleaded, in bar, a certain deed of release, founded on a general settlement of accounts between the parties. The bill did not suggest the existence of the release, nor was it apparently framed with any view to what the effect of that instrument would have been if set up by way of plea; it merely prayed a discovery of the several transactions stated in the bill, and a general account. It was held in the House of Lords, Lord Redesdale delivering the opinion, that this plea setting up the release must contain averments that the accounts were fair and just; and furthermore, that "these averments ought to have been supported by an answer to the same effect, setting forth the account settled, or referring to it, with an averment that the plaintiff had a counterpart; and specially negativing all the charges of fraud, imposition, usurious dealing and error, imputed to the transactions by the bill." For want of such a supporting answer the plea was overruled; but it was ordered to stand for an answer, with liberty to the plaintiff to except to its sufficiency as an answer.

In discussing the necessity for the requisite negative averments in the plea and for the proper supporting answer, Lord Redesdale said: "Upon argument of a plea, every fact stated in the bill, and not denied by answer in support of the plea, must be taken for true. . . . Without those averments, and that answer, it could not be good to any extent, because without them the bill must be taken for true, the accounts must be taken to have been fraudulent, unfair, usurious, and erroneous, and consequently the release founded on those accounts must have been deemed an unfair transaction, and no bar to relief."

The practical application of the principle in question is embodied in the proposition that on argument of the question whether a plea requiring the support of an answer is sufficiently supported or not, every allegation of the bill that is not denied by the answer must be taken to be true. The next inquiry is, whether, those facts being admitted, the plea is a sufficient bar to the relief.<sup>22</sup>

#### § 992. Bill Charging Fraud or Combination.

A recognition of one particular situation calling for an answer to support a plea is contained in equity rule 32. The reader will observe, however, that it is merely one of the several situations arising under the general doctrine already set forth.

Equity Rule 32 (in part): In every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.

require to be supported by an answer?" <sup>22</sup> *Bogardus v. Trinity Church* (1833) Apparently the true reason was that 4 Paige, 178, 197. the plea was affirmative, or was doing the office of an affirmative plea.



**§ 993. Support Necessary Only Where Fraud Charged Would Defeat Plea.**

In construing this rule, the words "plea to such part" must evidently be understood to refer to the case where the plea sets up a defense that would be adversely affected and defeated by proof of the fraud and combination charged in the bill. If the plea sets up a new defense that is not affected by the alleged fraud and combination, then it is not necessary to accompany the plea by an answer in support of it. Here the fraud and combination are irrelevant on the issue made by the plea, and the plaintiff is not entitled to discovery on the point of fraud and combination. For instance, if a bill is filed to have a deed cancelled on the ground of fraud and combination in the procurement of the deed and the defendant pleads a former decree, the plea need not be accompanied by an answer in support of the plea, though the bill charges fraud and combination. It will be noted that here the plea is a pure affirmative plea and is not directed to "the part" or matter to which the charge of fraud and combination applies. In order to make an answer in support of the plea necessary in such case the fraud and combination charged in the bill must be connected with the procurement of the decree set up in the plea. If the rule were construed so as to require an answer in support of the plea in every case where the bill charges fraud and combination, regardless of other conditions, the result would be that even a pure, affirmative plea would have to be supported by an answer. There is a suggestion in one or two decisions of circuit courts that such is the true effect of the rule,<sup>31</sup> but this must be considered unsound. The following case furnishes an illustration of what we consider to be the correct practice.

*Hilton v. Guyott* (1890) 42 Fed. 249: A citizen of France obtained a judgment against an American citizen in a court of France. He then sued at law on the judgment in the federal court of the southern district of New York. The defendant then filed a bill in equity to have discovery in aid of his defense in the suit at law. The bill alleged that the judgment recovered in the court of France was procured by fraud, that the suit was not fairly conducted, that the successful plaintiff had relied on false testimony, and had suppressed the truth. Furthermore, it was alleged that the suit was not conducted according

<sup>31</sup> *Jahn v. Champagne Lumber Co.* tenanced the proceeding, supposing that (1907) 152 Fed. 669. the answer was properly put in to sup-

In *Huntington v. Laidley* (1897) 79 Fed. 865, the very case put in the text equity rule 32. This we think to be a arose. The defendant accompanied his mistaken view. plea by an answer and the court coun-

to the forms of law prevailing in this country, and that the defendant was not permitted to cross-examine the witness, whereby a false case was presented to the court and a wrongful judgment had been given. The defendant in this equity suit (plaintiff in the action at law) filed a plea in which he properly set forth the decree of the French court and alleged that the court was one of competent jurisdiction. He therefore pleaded the decree as a bar to the discovery. The plea was not supported by an answer, and the same was held to be unnecessary. The plea, so the court held, was a good and sufficient plea, regardless of the truth of the matter charged in the bill by way of avoidance of the anticipated bar. Those equitable facts and circumstances, as stated in the bill, were not sufficient in law to impeach the decree in question. Hence those allegations were irrelevant; and inasmuch as a discovery in respect thereto could have been of no benefit to the plaintiff, an answer in support of the plea was unnecessary.<sup>22</sup>

Happily there is always one sure way out of any trouble that may arise about whether a plea should be supported by an answer. That is for the court to overrule the plea and order that it be incorporated in the answer. This course, as may be supposed, is frequently resorted to.<sup>23</sup>

#### § 994. Concurrent Use of Supporting Answer and Other Pleadings.

It is entirely possible for a plea and supporting answer to be used concurrently with other forms of pleading covering different ground. Thus in a given case, the defendant, after demurring to one part of a bill, may plead an affirmative plea to another part, a negative plea to still another part, and he may put in an answer to the residue. In such case he must also put in an answer supporting the negative plea, if that part of the bill to which the negative plea is addressed contains such charges of evidence as to require that the supporting answer should be put in. Of course situations that justify the use of so many diverse pleadings do not often arise, but the form and scope of the pleadings to be used in such cases are governed by principles already enunciated. It only needs to be added that when an answer in defense of a part of a bill is joined with an

<sup>22</sup> This case was reversed in the supreme court, but not on any point affecting the point of practice involved in the decision of the lower court. The supreme court held that the plea was bad in substance, and ordered it to be overruled. *Hilton v. Guyot* (1896) 160 U. S. 113, 40 L. ed. 95.

<sup>23</sup> *Bailey v. Wright* (1868) 2 Bond, 181, Fed. Cas. No. 749; *Dobson v. Peck Bros.* (1900) 103 Fed. 904; *Jahn v.*

*Champagne Lumber Co.* (1907) 152 Fed. 871; *United Cigarette Co. v. Wright* (1904) 132 Fed. 195.

This resource was not unknown to the English judges, as the following note will show: "Lord Eldon in his perplexity, declaring that the pleading filed by the defendant was in a correct sense neither a plea nor an answer, ordered the pleading to stand for an answer, with liberty to except." Observation of

answer in support of a plea, care must be taken that the supporting answer shall give discovery to those matters only in the bill that constitute evidence of facts having a tendency to defeat the plea, and that the answer in defense shall not extend to any part of the bill covered by the plea. If the answer in defense does extend to the part covered by the plea and include the whole of the defense set up by the plea, the plea will be overruled. But if the answer inadvertently extends to a part it will not overrule the plea.<sup>54</sup>

#### § 995. Supporting Answer as Evidence on Argument of Plea.

The answer in support of the plea is put in under oath, and it is competent evidence on any issue arising in the case. It follows that the plaintiff is entitled to use it to invalidate the plea, not only on the hearing of the cause at the trial of the issue of fact raised by the plea after the plea is adjudged to be good on argument, but on the argument of the plea itself before any evidence can be given. For the purpose of defeating the plea at the argument of the sufficiency of the plea, the plaintiff may read from the answer any facts or admissions negating the matters averred in the plea.<sup>55</sup>

#### § 996. Answer Must Corroborate Plea.

In theory, an answer in support of a plea is required on the supposition that, when brought in, it may be found to contain sworn admissions of fact fatal to the truth of the plea. It is required in deference to the plaintiff's right of discovery; and it is not, in theory, required in order that the defendant may thereby be enabled to fortify and strengthen his plea. In actual practice, however, the effect of the answer is to aid the defendant and not the plaintiff, for a defendant will not put in a plea when he sees that his sworn answer will immediately destroy it. The answer in support of a plea therefore always tells the same tale as the plea; and it must do this, or the plea is defeated.

From this the reader will at once perceive that, after all, the answer in support of a plea is largely a matter of mere form. It is a technicality of pleading that in actual practice neither brings the plaintiff any benefit<sup>56</sup> nor adds any strength to the defendant's posi-

Mr. Mitford *apropos* of the ruling in *Bayley v. Adams* (1802) 6 Ves. Jr. 583. See Mitf. & Tyler Pl. in Eq. 74.

<sup>54</sup> Equity Rule 37.

<sup>55</sup> 2 Dan. Ch. Pr. 133.

<sup>56</sup> In *Hunt v. Penrice* (1853) 17 Beav. 530, the Master of the Rolls, in passing on the question whether an answer in support of a plea ought to be required in that case, said: "It requires

tion. That it cannot add to the credibility of the plea in point of fact and reason, is obvious from the circumstance that in practice all pleas are sworn to as well as answers. But in the theory of equity pleading it is the answer that is to be believed, because it embodies a discovery and is evidence. The plea is a mere defensive pleading, and the oath attached to it does not impart to it the faculty of being evidence such as to make it self-proving like the answer.

**§ 997. Contents of Plea Supported by Answer.**

The office of the supporting answer, as we have seen, is to give discovery as to matters alleged in the bill and denied by the plea, which if true would defeat the plea; and it will be noted that in order for the defense to be good it is necessary that both the plea and the answer should contain the necessary denials of those matters. For instance, if fraud is set up in a bill to defeat an anticipated defense, both the plea and the answer must negative the fraud; and a plea is bad if it fails to do so.<sup>87</sup> It might seem that this is not necessary and that all the purposes of pleading would be attained if the requisite denials were contained in the answer alone; but the rule is established otherwise. The plea is the pleading that contains the defendant's defense, and this pleading must be sufficient, considered in and of itself alone, to show a good defense without reference to the denials of the answer.

**§ 998. Particularity of Denials in Plea and Answer.**

But as regards the particularity and fullness of the necessary denials, there is said to be a distinction between the plea and answer. All that is necessary in the plea is a general averment traversing and denying the hurtful matter; while in the answer the denials should be full and circumstantial.<sup>88</sup> This is more particularly true where the answer goes to charges of fraud.

§ Daniell, Chancery Practice, 133, 134: "The answer, then, being no part of the defense, but only what the plaintiff has a right to require, to enable him to avoid that defense, it follows that it must be full and clear, otherwise

little experience in this court to see Fed. 247; *Lewis v. Baird* (1842) 3 that if an answer is compelled to be McLean 56, Fed. Cas. No. 8,316; *Sims* put in by the defendants to the alle- v. Lyle (1822) 4 Wash. C. C. 301, Fed. gation, the answer will, in all proba- Cas. No. 12,891. See *Jones v. Davis* bility, be of little benefit to the plain- (1809) 16 Ves. Jr. 262.

<sup>87</sup> *Armengaud v. Coudert* (1886) 27 in Chan. (2d ed.) § 347.

it will not support the plea; for the court will intend all matters charged in the bill, to which the plaintiff is entitled to an answer, to be against the pleader, unless they are fully and clearly denied. Thus, if a bill is filed to set aside a decree or other instrument sought to be set aside in bar, the defendant must answer the facts of fraud alleged, so fully as to leave no doubt on the mind of the court that, upon that answer, if not controverted by evidence on the part of the plaintiff, the fact of fraud cannot be established. If the answer should not be full in all material points, the court will presume that the fact of fraud may be capable of proof in the point not fully answered, and will, therefore, not deem the answer sufficient to support the plea, and upon that ground will overrule the plea. But although an answer in support of a plea is required to be full and clear, yet, if the equitable matters charged are fully and clearly denied, it may be sufficient to support the plea, although all the circumstances charged in the bill may not be precisely answered."

### § 999. Discovery of Documents in Supporting Answer.

It is sometimes necessary that an answer in support of a plea should contain discovery of documents and papers in the defendant's possession. The rules by which this matter is governed are not different from those that control as regards the discovery of facts in such an answer. The following proposition formulated by Mr. Daniell seems to cover the case well enough for our present purposes.

2 Daniell, Chancery Practice, 131: "Wherever the bill states or charges any facts which are inconsistent with the defendant's plea, or which would take the plaintiff's case out of the operation of it, and charges that the defendant has in his possession documents from which the matters in the bill mentioned would appear, then it will be necessary to accompany the plea by a discovery of the documents in the defendant's possession." However this rule, says the same author, is not applied in those cases "where the bill misstates the effect of deeds which form the substance of the plea and are stated in it." 22

### § 1000. Supporting Answer Unnecessary, if No Discovery Sought.

As the only purpose of an answer in support of a plea is to give discovery, it follows by necessary consequence that if the plaintiff seeks no discovery, or if he seeks discovery about immaterial issues, he is clearly not entitled to any discovery, and the supporting answer need not be put in. All of the authorities in any way concerned in this matter proceed on the assumption, express or implied, that the right of the plaintiff to insist that the plea shall be accompanied by an answer rests solely and exclusively on his right to discovery. It follows that no obligation rests on the defendant to put in such an answer where the right to discovery does not exist. Furthermore, as

<sup>22</sup> 2 Dan. Ch. Pr. 131.

the defendant is not bound to put in an answer in support of his plea in this case, it follows that he ought not to put in such an answer.

**§ 1001. Supporting Answer Proper Only Where Bill Contains Charges of Evidence.**

Proceeding on the principle stated in the preceding paragraph, the English court of chancery, in the early part of the last century, reached the conclusion that a plea does not need a supporting answer where the bill contains no charges of evidence. In 1821, Sir John Leach ruled that an answer in support of a negative plea should contain discovery as to those matters only that are expressly charged in the bill by way of evidence, and concerning which discovery is expressly sought, and not as to the allegation directly denied by the plea.<sup>40</sup> In a later case, the same judge went further and held that an answer in support of a negative plea not only need not but must not extend beyond charges of evidence. Accordingly, in this case, a plea was overruled where the answer purporting to be in support of the plea was improperly put in, there being no specific charges of evidence calling for an answer in support of the plea.<sup>41</sup>

**Illustration:** The following situation will show the exact import of the ruling embodied in the cases just referred to. A bill is filed for an accounting of partnership affairs. Such a bill must contain, of course, a charge that the partnership existed and that the particular defendant was a partner therein. That allegation is the very basis of the plaintiff's title to relief. But apart from this allegation of the critical fact of partnership, the plaintiff may go further in his bill and set forth the evidence on which he bases the allegation that the defendant was in fact a partner in the enterprise. These charges of evidence are, or used to be, inserted in the charging part of the bill; and it is in regard to those charges that the plaintiff is technically entitled to discovery. Now the point embodied in the decisions under consideration is, that if the defendant puts in a plea to such a bill denying that he was a partner, then he should not support that plea by an answer, if the bill contains only the general allegation of partnership, without charging matters of evidence on that point; but he must support the plea, if the bill contains sufficient charges of evidence.

It is demonstrably certain that the distinction here drawn is unsound and that the decisions in question are incorrect. In practice it is impossible to discriminate, as regards the right to discovery, between allegations made in the bill by way of pleading and

<sup>40</sup> *Sanders v. King* (1821) 6 Madd. Ch. 61.

<sup>41</sup> *Thring v. Edgar* (1825) 2 Sim. & Stu. 274.

charges made by way of evidence; and besides the attempt to make such a discrimination is at variance with the established principle that the right of discovery extends to all the allegations of the bill, whether contained in the stating or charging part. The true principle applicable to the illustration above given must be that the answer denying the fact of partnership should be accompanied by an answer in support of the plea, whether the bill alleges the existence of the partnership generally and by way of pleading only, or whether it contains in addition specific charges of evidence on that point.<sup>42</sup>

However, the rule stated above and embodied in the English decisions referred to has not been formally overruled, but on the contrary has been commonly accepted as good law, and the courts have attempted to give effect to it.

1. *Rhino v. Emery* (1897) 79 Fed. 483: In a suit to hold a defendant to an accounting as trustee of certain real and personal property, the bill set out a pedigree showing that two of the parties to the suit were sole heirs of one B. It was said that a plea denying the heirship of these parties ought to be supported by an answer denying the statements of pedigree contained in the bill; for those statements were matter of evidence.

But another allegation in the bill was to the effect simply that the blood of a certain ancestor had become extinct on the death of a particular person, and no facts were charged by way of evidence of this allegation. It was held that a plea negating this statement need not be supported by an answer; for there were "no facts averred in the bill which, if admitted, would defeat the

<sup>42</sup> Professor Langdell has pointed out that the mistake embodied in those decisions probably resulted from a confusion in the mind of the court as to the application of another principle of pleading, to which we have already referred, viz., that an answer covering the same ground as a plea overrules it. Langdell, Eq. Pl. 103. That rule clearly has no application in this connection. Answers in support of pleas always cover the same ground as the pleas; but, inasmuch as they contain discovery only, they do not overrule the plea.

*Ferguson v. O'Harra* (1818) Pet. C. C. 493, Fed. Cas. No. 4,740, furnishes a very striking illustration of the confusion to which Professor Langdell refers. Here the plaintiff, claiming land as heir of her father, filed a bill to set aside a sale under a judgment alleged to have been fraudulently obtained against the administrator of her father. The defendant, as a subsequent purchaser, was charged with notice of the fraud. To this bill the defendant plead-

ed innocent purchase, denying notice of the fraud. He also answered, alleging himself, as in the plea, to be a purchaser for a valuable consideration without notice of the fraud. It was held that the plea was overruled by the answer. The idea on which the court proceeded was that inasmuch as the answer went to the whole bill it must overrule the plea. This is a curious blunder. Of course being in support of the plea, the answer had to be coextensive with the plea; and the plea being to the whole bill, the answer had to be to the whole bill. If the notion on which the court there proceeded were correct, no plea could ever be supported by an answer except where the plea goes to only a part of the bill. So indeed the court seems to have understood the law to be. This decision is a sort of American counterpart of *Thring v. Edgar*, though the fallacy of the decision is here more easily perceptible than in the English case.

negative averment." The court observed that no answer in support is necessary where the bill stands solely on the bare averment of a fact constituting the basis of the plaintiff's title to relief.

2. 2 Daniell, Chancery Practice, 123, 124: Mr. Daniell, with a considerable show of learning, expresses the opinion that the rule enunciated in the decision of *Thring v. Edgar* is correct. The following extract from his comment on the case will prove enlightening: "The rule laid down and acted upon in the case was simply, that when a defendant denies the plaintiff's title by a negative plea, he must not accompany his plea by an answer as to any facts stated in the bill which constitute part of such title, unless his attention is drawn to such facts by some charge or statement in the bill, indicating that the plaintiff requires a discovery as to those facts, and what the particular facts are as to which the discovery is required. . . . The rule cannot be taken as indicating the necessity of the plaintiff's pointing out the parts of the bill he requires to have answered, by any 'regulation-mark,' such as the words, in evidence, etc.; all that is required by the rule is, 'that in order that the defendant may know what the particular points are as to which a discovery is required, the plaintiff should call his attention to them in his bill.' . . . The rule, therefore, in *Thring v. Edgar*, must be held as merely prohibiting a defendant who has denied the plaintiff's title, by a negative plea, from answering as to any of the circumstances of the plaintiff's title, or which would afford *direct* evidence of it, unless such an answer is specifically called for by the form of the bill."

It thus appears that the doctrine in question, though of more than doubtful soundness, has managed to maintain itself in the law. Undoubtedly, if the situation calling for the application of this rule had been often presented to the courts it must have succumbed, sooner or later, to criticism. As such cases have seldom arisen, the courts have contrived to get along without overruling the doctrine. There is, too, another aspect of the matter in which it must be considered that this episode in the history of equity pleading has a real significance. It will be noted that whatever departure from principle is found in this doctrine manifests itself in a tendency to dispense with the requirement of the answer in support of a plea. The courts have here apparently recognized the fact that the answer in support of a plea is, after all, a mere technicality,—a form not calculated to assist the defendant's cause and absolutely certain to do the plaintiff no good. Hence judicial ingenuity has been taxed to enable the court to dispense with the supporting answer. Whatever mistake was made, was made in the right direction.

#### § 1002. Supporting Answer Must Respond Only to Interrogatories.

The attempt to apply, with critical accuracy, the principle established in the English cases mentioned above must, in any event, have



been beset with difficulties. In the effort to make a practical working rule out of it, the courts have sometimes sanctioned the following device of pleading, that is to say, in putting in a plea supported by an answer, the defendant has been permitted to plead to all the bill except the interrogating part. To the interrogating part, and to this part only, he answers.<sup>43</sup> This would have been all right if the two different elements of which the bill consists, to wit, pleading and charges of evidence to be discovered, were clearly differentiated and separated into the stating and interrogating parts of the bill. But this is not so. The interrogatories are founded on the allegations of the bill; and the right of discovery unquestionably extends to all the matters stated in the bill, not to the interrogatories only. The practice in question was clearly bad; but an idea, thence deduced, seems to have found some currency to the effect that an answer in support of a plea is never required unless specific interrogatories are filed seeking discovery of matters destructive of the defense embodied in the plea.<sup>44</sup> It is needless to observe that this view is not supported by good authority, at least so far as the practice of the federal courts is concerned.

#### § 1003. Supporting Answer Unnecessary Where Oath Waived.

The foregoing discussion has doubtless prepared the mind of the reader to accept the conclusion that a supporting answer is never necessary where the plaintiff's bill waives the oath to the defendant's answer, in conformity with the provision contained in the amendment of equity rule 41. This conclusion follows from several different considerations, but a sufficient reason would seem to be found in the fact that an unsworn answer, or an answer where the oath is waived, cannot really give support to a plea. To require a sworn plea—and in our practice all pleas must be verified by oath—to be accompanied by an unsworn answer is an absurdity. The answer in support of a plea is a pure piece of formality, and the tendency of legal development is surely towards its extinction. If any good reason could be shown why it should, as a matter of policy, be retained, some legal

<sup>43</sup> Langdell, *Eq. Pl.* 104.

<sup>44</sup> In *Hilton v. Guyott* (1890) 42 Fed. 242, 251, it is said: "In modern practice, even though the bill contains such anticipatory averments [i. e., equitable facts and circumstances destructive of the efficacy of the anticipated plea], no answer in support of the plea is necessary, unless discovery upon inter-

rogatories is called for." Citing *Dawson v. Pillig*, 17 L. J. Ch. 394; *Webster v. Webster* (1853) 1 Smale & G. 489. And again: "If interrogatories are annexed to the bill, respecting material anticipatory facts, as to which the answers might tend or be evidence to countervail the plea, then the plea must be supported by an answer."

astuteness might be resorted to to save it in suits where the oath is waived. In the absence of some very good reason, the courts, it seems, should be content to dispense with it in such suits. To hold that an answer in support of a plea is not necessary where the oath is waived will undoubtedly contribute more to consign this pleading to obscurity than any other step that could now be taken without abolishing it altogether. The exact question here raised has not been decided by any of the federal courts; but it is presumed that when the question is presented, the decision of the court will be to the effect above indicated.<sup>45</sup>

**§ 1004. Validity of Plea Unaccompanied by Unsworn Answer.**

But the question arises, if a defendant is not required to put in an answer in support of his plea, when the oath is waived, what becomes of his plea? Are all the facts stated in the bill as evidence to defeat the defense raised by the plea, thereupon to be assumed as true, and the plea overruled for lack of the support that an answer would otherwise have given? Not so, clearly. The plea must be considered on its own merits exclusively. If it states a good defense, it must be allowed to be good, though the bill contains charges that, if admitted, would defeat the plea. By waiving the oath the plaintiff waives the right to have discovery as to charges of evidence and as to all matter set out by way of anticipatory defense. Hence, upon waiving the oath, he cannot, as formerly, insist that the constructive admission of the plea shall extend to those matters. It follows that when the oath is waived and the plea is left unsupported by an answer, the plea may well be considered to be good if, under the former practice, it would have been made good by the help of an answer giving the necessary support.

**§ 1005. Testing Sufficiency and Validity of Plea.**

If an answer in support of a plea appears to have too broad a scope and the plaintiff wishes to test the question whether or not the plea has been overruled by such answer, it is a permissible practice for him to move to strike the plea from the files,<sup>46</sup> or he may set the

<sup>45</sup> In considering this matter we have authority comes from a court which dealt with it exclusively as a question also holds that an answer cannot be of federal practice. We are aware that excepted to for insufficiency where the in some of the state courts it has been oath is waived. Hence, it cannot be heretofore held that an answer in support of a plea is unnecessary where the considered as being entirely in point in the oath is waived. *Cheatham v. Pearce* federal practice.  
 (1891) 89 Tenn. 668, 679. But this <sup>46</sup> *Mercantile Trust Co. v. Missouri* etc. R. Co. (1898) 84 Fed. 379.

plea for hearing on argument of its sufficiency, which is probably the better practice.<sup>47</sup> So if he thinks the plea to be insufficient for any reason, as for lack of the denials necessary to be made in such a plea, or because the defense set up is bad in law, he should likewise set the plea for argument on its sufficiency.<sup>48</sup>

If an answer in support of a plea is insufficient in point of discovery and does not give the plea the support necessary to make it good and effective, the plea may be set for argument, and the same will be overruled. A plea requiring the support of an answer must be overruled on argument unless every allegation or charge in the bill that is inconsistent with the plea, and that is not expressly denied by the plea, is fully denied in the answer.<sup>49</sup> In other words, if the situation is such that the plea should be supported by an answer, the plea will be held bad unless it gets the necessary support.

#### § 1006. Excepting to Answer for Insufficiency.

As a plea requiring the support of an answer will be held insufficient unless it gets the required support, so likewise the answer itself which fails to give the requisite support to the plea is also subject to exceptions for insufficiency by reason of its failure to give such support. It thus appears that where the answer in support of a plea is insufficient, both the plea and the answer are subject to attack. But it should be remembered that if the plaintiff excepts to the answer before arguing the sufficiency of the plea, this operates as an admission of the sufficiency of the plea.<sup>50</sup> Hence the plaintiff should always have the plea argued first, if he wishes to make any question of the sufficiency of the plea.

#### § 1007. Summary—Six Propositions.

The intelligent use of answers in support of pleas will be assisted by a consideration of the following six propositions, which embody a summary of the more important principles discussed in the preceding pages. They undertake to define certain conditions under which the answer in support of a plea is not required.

1. An affirmative, or pure, plea does not, under any circumstances, require an answer in support of it. The only pleas ever requiring the

<sup>47</sup> *Hunt v. Penrice* (1853) 17 Beav. 525; *Armengaud v. Coudert* (1886) 27 Fed. 247. <sup>48</sup> *Harris v. Harris* (1844) 3 Hare, 450. <sup>49</sup> *Hatch v. Bancroft-Thompson Co.*

<sup>50</sup> *Armengaud v. Coudert* (1886) 27 Fed. 247. (1896) 67 Fed. 802.

support of an answer are negative pleas and affirmative pleas containing negative averments (anomalous pleas).

2. A plea, though it contains negative averments, does not require a supporting answer where the negative averments of the plea are unnecessary and where the defense can properly be made by a pure plea; or where the plea, though negative in form, is affirmative in substance.

3. A plea does not require an answer to support it where the equitable circumstances set forth in the bill are insufficient to defeat the plea. If that matter may be admitted to be true without impairing the efficacy of the plea, the supporting answer is unnecessary.

4. A plea does not require an answer in support of it where the bill seeks no discovery.

5. A plea does not require a supporting answer where the bill contains no charges of evidence.

6. A plea does not require a supporting answer where the defendant's oath to the answer is waived in the bill.

#### § 1008. Answer in Subsidium.

In concluding our observations on the subject of answers in support of pleas, we should perhaps refer to another sort of plea spoken of in the old books on equity pleading, but which, so far as we are able to discover, is now wholly unknown to the practice of the courts, or at least unknown to the practice of the federal courts. This is the answer in aid of a plea, or an answer *in subsidium*. The nature of this plea is sufficiently set forth in the extract from Mr. Daniell contained in the foot note.<sup>61</sup> A sufficient reason for the nonuser of this

<sup>61</sup> Says this writer: "It is to be observed, that the cases above referred to, as requiring that a plea should be accompanied by an answer, are those only in which some fact or matter is stated or charged by the bill, which, if true, would have the effect of overruling the plea; there are cases, however, in which, even though no equitable circumstances are alleged in the bill, to defeat the bar offered by the plea, when, in fact, a pure plea may be pleaded; yet the defendant may support his plea by an answer, touching matters not charged in the bill. Thus, in the case of a plea of purchase for valuable consideration, a defendant may deny notice in his answer as well as in his plea; because, by so doing, he does not put anything in issue which he would cover by his plea from being put in issue. A defendant may also, by this means, put upon the record any fact which tends to corroborate his plea, so as to enable him afterwards to prove it. An answer of this sort is termed an answer *in aid* or *in subsidium* of the plea, and differs from what is usually termed an answer in support of a plea, in being an answer which the defendant is not obliged to put in for the purpose of avoiding the effect of any equitable ground which may be alleged in the bill, for avoiding the bar offered by the plea." 2 Dan. Ch. Pr. 134, 135. The author refers to Gilbert, *Forum Romanum* 58; Beames on Pleas, 77; and Rord Redesdale 237.

type of plea is found in the fact that it is never absolutely necessary to resort to it; and we apprehend that, if it were actually tried, it would be found to be out of harmony, and inconsistent, with modern notions of pleading.

*Plea or Demurrer Incorporated in Answer.*

**§ 1009. Answer May Embody Matter of Plea or Demurrer.**

A plea in bar is after all, as we have already more than once observed, only a special kind of answer; and whatever defense may be made by plea in bar may be made by answer.<sup>52</sup> The same is true of all substantial defenses to the merit that might be made the basis of a demurrer.

1. Equity Rule 23 (in Series of 1822): The defendant, instead of filing a formal demurrer or plea, may insist on any special matter in his answer and have the same benefit thereof, as if he had pleaded the same matter, or had demurred to the bill.

*Livingston v. Story* (1837) 11 Pet. 351, 393, 9 L. ed. 746, 763: In this case the court, interpreting the above rule, observed: "This rule is understood by us to apply to matters applicable to the merits, and not to mere pleas to the jurisdiction, and especially to those founded on any personal disability, or personal character of the party suing, or to any pleas merely in abatement. In this respect it is merely affirmative of the general rule of the court of chancery; in which matters in abatement and to the jurisdiction, being preliminary in their nature, must be taken advantage of by plea; and cannot be taken advantage of in a general answer which necessarily admits the right and capacity of the party to sue." This interpretation of the rule was brought out more clearly when the rule was remodelled and incorporated, as rule 39, in the rules of 1842 now in force.<sup>53</sup>

2. *Holton v. Guinn* (1895) 65 Fed. 451: To a bill for a partition sale and an accounting as between tenants in common, it is good matter for plea that the land in question is held by the defendant as surviving partner of a partnership; that the partnership affairs have never been settled; that the land in question is subject to the partnership debts; and that the partnership will, upon accounting, be found to be indebted to the defendant. Being good matter for a plea, this defense can be incorporated in the answer.

**§ 1010. Discovery as Affected by Incorporation of Plea in Answer.**

However, by the settled principles of equity pleading, there is one consequence that always attaches when the defendant elects to set up

<sup>52</sup> Equity Rule 39.

<sup>53</sup> See the reservation contained in the part of rule 39 *infra*, that is found in the parenthesis. By this reservation matters of form, matters in abatement, and matter going to the character of the parties must still be taken advantage of in the early stages of the suit, and they

in his answer a defense available by way of plea; and it is this particular consideration that has heretofore secured to the plea its independent position in the system of equity pleading from which it has been impossible to dislodge it. The consideration referred to is found in the duty of the defendant to give discovery. A defendant who submits to answer is bound to answer fully to all the matters in the bill; and one of the main purposes of pleading in bar without answering is to escape from this obligation. We have seen that by pleading a good plea the defendant does effectually avoid the necessity of giving discovery; and the only exception to this is, that in connection with negative and anomalous pleas he must give such discovery as may be supposed to be helpful to the plaintiff on the issue raised by the plea.

Now, in the modern system of equity pleading, the tendency during a considerable period has been to discourage the use of pleas; and, by necessary consequence, to encourage the practice of putting all defenses in bar and to the merits in the answer. This tendency is manifested in equity rule 39, which undertakes to secure to a defendant who may be induced to put matter of plea in bar into his answer the same degree of protection from the duty to make discovery that he would have had if the defense had been set up by a separate plea.

**Equity Rule 39:** The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense. Thus, for example, a *bona fide* purchaser, for a valuable consideration without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

Upon consideration of the full import of this rule, it will be found to be quite radical; and, theoretically speaking, no rule could be

are not available by way of answer. tion of the court, as dependent on the But it must be remembered that now, character of the parties, etc., are practically open at every stage of the suit, under the Act of March 3, 1875, mat- ters in abatement going to the jurisdic-

Eq. Prac, Vol. I.—39,

more calculated to upset settled principles of equity pleading. In this connection we are reminded of an observation made long ago by Mr. Mitford. "The modern practice," said he, "of making all defenses by answer has led to great confusion; and questions in pleading have arisen so paradoxical that judges perplexed and bewildered have hardly known how to decide them."<sup>54</sup> That the rule in question has not produced more harmful results, in actual practice, is due to the circumstance that the subject of discovery is of so little importance of late years. The rule strikes at a moribund right, and hence little or no protest has been made against it. Indeed so little attention has been paid to the matter that less than half a dozen cases are found in the books where the application of the rule is discussed at all.

### § 1011. Affirmative Plea Embodied in Answer.

In order that we may appreciate the force of the rule, it is necessary to remember that pleas in bar setting up good matter of defense may be either affirmative, negative, or anomalous. The affirmative plea in bar, when separately pleaded, needs no support from any answer. Hence when such a plea is incorporated in the answer, and the plea goes to the whole bill, the defendant is not required to give any discovery whatever in response to the allegations and charges of the bill, and an answer in such case cannot be excepted to for insufficiency when it fails to give discovery. Here the general effect of the rule is to leave the plaintiff under the burden of proving his bill and to take from him the right to insist on disclosures in the defendant's answer in every case where matter of plea incorporated in the answer and pleaded as matter of plea in bar is sufficient in law to defeat the suit.<sup>55</sup> Of course if the matter of affirmative plea in bar goes to a part of the case made in the bill, and not to the whole, it protects from discovery only to that extent; and the defendant will be bound to make discovery to the other part the same as if the plea had not been incorporated in the answer. The following cases show what happens when an affirmative plea in bar to the whole bill is incorporated in an answer and the defendant sees fit to invoke equity rule 39.

1. *Gaines v. Aguelly* (1872) 1 Woods 228: To a bill to establish plaintiff's right to land the defendants made answer incorporating therein a defense founded on a prescriptive title in themselves. This defense was in the nature

<sup>54</sup> Mitf. Eq. Pl. (Tyler's ed.) 74.

<sup>55</sup> See *Hatch v. Bancroft-Thompson Co.* (1895) 67 Fed. 802, 805.

of a plea in bar to the bill. The other part of the answer set up another defense, and the answer did not contain responses to certain material charges in the bill. Nor did the defendant answer the interrogatories filed with the bill. The plaintiff excepted for insufficiency of the answer. It was held that the exceptions could not be maintained. Said Bradley, Circuit Justice: "Under the old practice if a plea in bar were filed, and issue taken upon it, and that issue were decided in the complainant's favor, he was entitled to a decree without proving the allegations of his bill. If the same matter were set up in an answer, he was obliged to prove his bill; but in aid of such proof he was entitled to defendant's answer to the whole bill. The new rule, which allows a defendant to set up a bar in his answer, and excuses him from answering further, still leaves the complainant under the burden of proving his bill, and takes from him the benefit of the defendant's answer. But this disadvantage is compensated for, in some degree, by the liability of the defendant to be called as a witness in the cause. Still, the general effect of the new rule being such as I have stated, it seems to be no longer a ground of exception, where the answer sets up a bar to the whole bill, and claims the benefit of it, as of a plea in bar, that it does not fully answer the allegations of the bill. If the bar set up and claimed as such be insufficient, or if it be unsupported by proper averments, or by a proper answer to rebut allegations of the bill repugnant to the bar, the complainant may except for insufficiency, set the cause down on bill and answer only, or file a replication and proceed to proofs, according to the exigency of the case. If the bar set up should be insufficient as such, I think the complainant would be entitled to except, as for want of a full answer, and to avoid answering the exceptions, the defendant, in such case, would require leave of the court before he could amend the bar set up in the answer. If, instead of excepting, the complainant should go to proofs, the burden would be on him to prove his bill, and on the defendant to prove his bar, each being entitled to examine the other as a witness."

2. *Samples v. Bank* (1873) 1 Woods 623, Fed. Cas. No. 12,278: The answer contained a defense that was substantially a plea in bar of the statute of limitations. It was well pleaded and set forth a defense good in substance. It was held that, under equity rule 39, the defendant was excused from answering, by way of discovery, to other parts of the bill.

### § 1012. Negative or Anomalous Plea Embodied in Answer.

- If the plea incorporated in the answer is a negative or anomalous plea and such as would have required the support of an answer if the plea had been separately filed, then the defendant must, in the answer embodying that plea, give the same discovery that would otherwise have been given in a separate answer in support of the plea. But he need not give any further discovery. The plea of *bona fide* purchase put by way of example in the rule sufficiently illustrates this point.<sup>56</sup>

<sup>56</sup> Equity Rule 39.

In *Playford v. Lockard* (1896) 65 Fed. 870, it is said that the protection of rule 39 does not extend to matters covered by plea in abatement. The rule

contemplates only pleas in bar or to the merits. The true import of this case seems to be found in the circumstance that the plea there in question was a negative plea, and should have



### § 1013. Mode of Pleading Matter of Plea in Answer.

In order that the courts may have some intelligent criterion by which to be guided in deciding whether equity rule 39 is applicable, it must appear, before the defendant can invoke the benefit of the rule, that the matter of plea in bar, incorporated in the answer, is there pleaded and relied on as matter of plea.<sup>57</sup> If the defendant merely sets out that defense by way of answer in the same way that he sets out other defenses in the answer, and thus gives no notice that he is really relying on a plea, he should not be permitted to invoke the protection of the rule. There ought to be something in the pleading to apprise the plaintiff of the defendant's rights under it; and if the defendant does not give notice, by the form of his answer, that he is relying on matter of a plea as if it had been pleaded separately, his answer should be treated as any ordinary answer, and full disclosures should be required. The propriety of this is more clearly perceived when we remember that it has always been permissible to set out matter of plea in answers. There ought to be something to show whether the defendant is proceeding under the old system or is proceeding under the protection of equity rule 39. The defendant should claim the benefit of the matter of plea in bar either expressly in the answer or by necessary implication from the language in which the answer incorporating the plea is couched. The following decision is instructive, though the precise point was not under consideration.

*National Brake Beam Co. v. Interchangeable etc. Co.* (1887) 83 Fed. 26: To a bill for the infringement of a patent, the defendant set up six defenses in the answer, some, or perhaps all, of which might have been made the basis of separate pleas; but there was nothing in the answer to show that those defenses were incorporated therein as pleas. It was contended that because the defendant might have resorted to a separate plea, or separate pleas, he was thereby entitled, under equity rule 39, to complete protection against discovery. The court did not assent to this view.<sup>58</sup>

been supported by an answer giving the discovery sought by the interrogatories. Fed. 185, it would appear that rule 39 Hence it was proper to hold that the does not excuse a defendant from an- discovery should be given. swering by way of discovery where the

<sup>57</sup> The answer must claim the benefit matter in bar incorporated in the an- of the matter, as of a plea in bar. swer admits the material fact on which Bradley, Circuit Justice, in *Gaines v. the right to discovery rests.* Agnally (1872) 1 Woods 242.

<sup>58</sup> From *Fuller v. Knapp* (1885) 24  
does not excuse a defendant from an-  
swering by way of discovery where the

**§ 1014. Rule 39 Inapplicable Where Separate Plea Overruled and Incorporated in Answer.**

We venture to make still another application of equity rule 39. It applies only to those situations where the defendant, in the exercise of his own choice, elects to set up matter of plea in bar in his answer in the first instance instead of pleading it separately. The rule was not intended to apply where the defendant first pleads separately and the court overrules the plea with leave to the defendant to rely on the same in his answer. Upon incorporating such a plea in his answer, the defendant is not entitled to refuse to give discovery, as he might have done, under rule 39, if he had originally pleaded that defense in his answer. The reason for this is that the order of the court overruling the plea is a judicial expression to the effect that the plea is bad as a plea. Of course a bad plea will not, as a plea, protect the defendant from giving discovery; and hence it cannot have a greater effect when incorporated in the answer.

But certainly a court, on overruling a plea and ordering it to be incorporated in the answer, could make a further order to the effect that on incorporating said plea in his answer the defendant should have the benefit of the privilege conferred by the equity rule.



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